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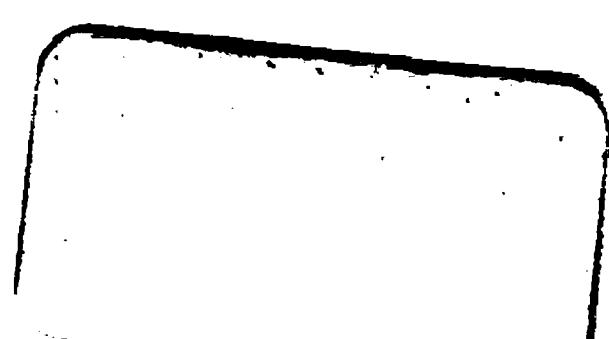
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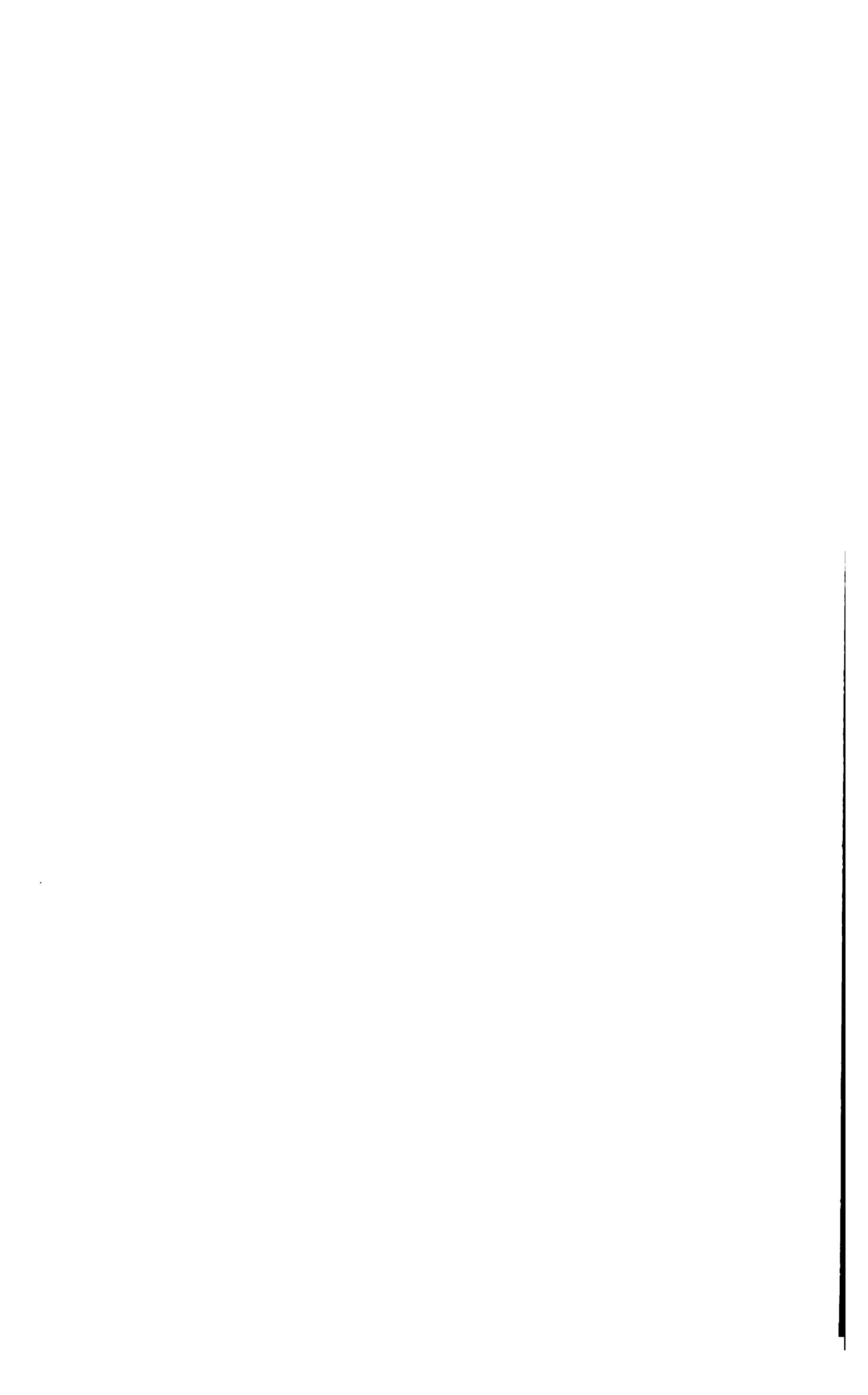
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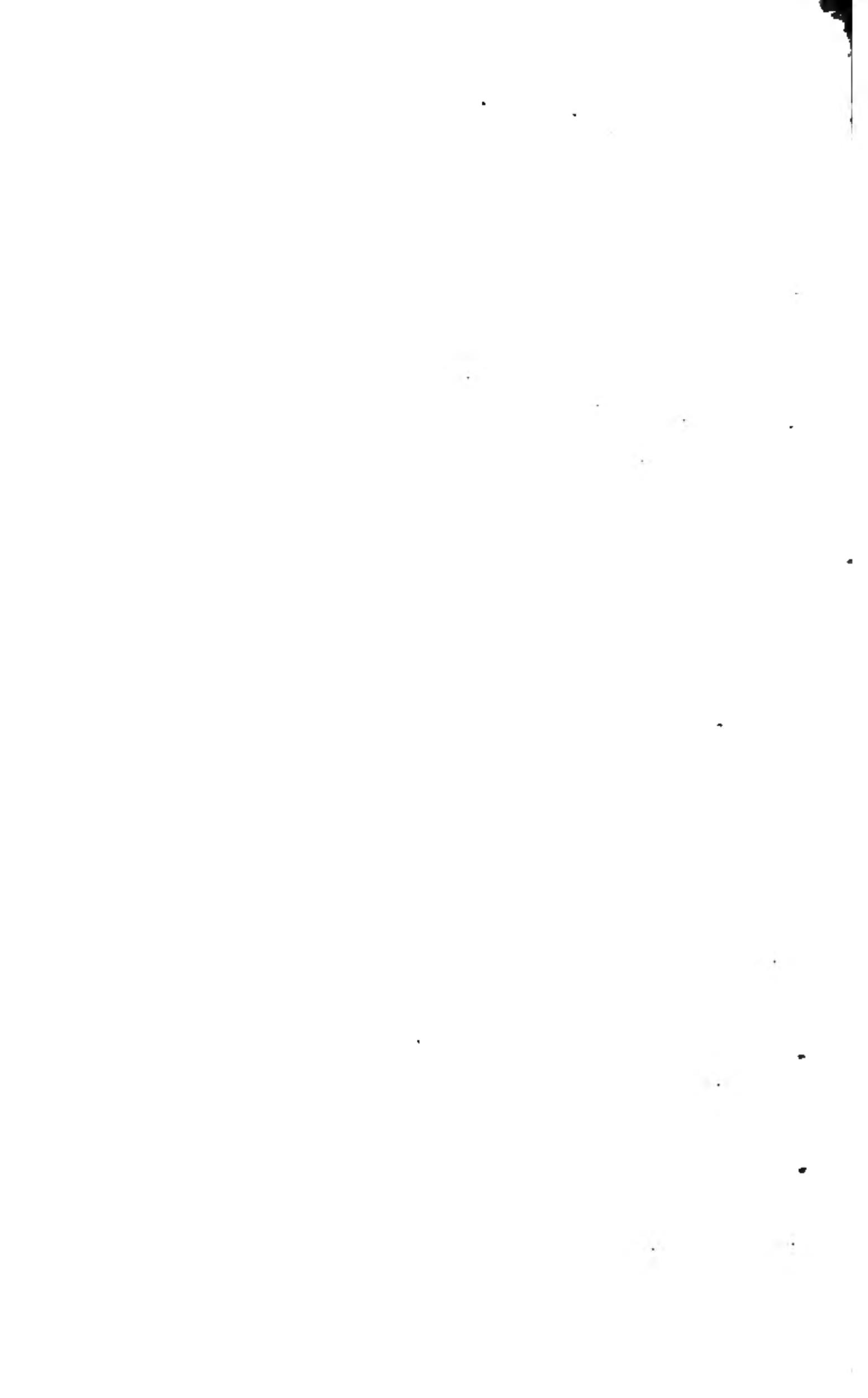
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PACIFIC COAST
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LAW JOURNAL.

CONTAINING ALL THE

Decisions of the Supreme Court of California,

AND OF THE

*U. S. CIRCUIT AND U. S. DISTRICT COURTS FOR THE DISTRICT
OF CALIFORNIA; and IMPORTANT DECISIONS OF THE
U. S. SUPREME COURT AND HIGHER
COURTS OF OTHER STATES.*

W. T. BAGGETT, Editor.

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TABLE OF CASES.

PAGE.	PAGE.		
Ah Yup, In the matter of.....	195	Ex parte Frank.....	27
Ambrose vs. McDonald.....	204	Eureka Con. Mining Co. vs. Rich-	
Atkinson vs. Amador and Sacra-		mond Mining Co.....	111
mento Canal Co.....	226	Elliott vs. Peck.....	222
Allen vs. Tiffany.....	237	Edwards vs. Kearzy.....	284
Atherton vs. Fowler.....	321	Eggleston vs. Boardman.....	392
Arthur vs. Craig.....	435		
Bihler vs. Platt.....	68	Fosayman vs. Twombly	5
Bergheim vs. The Great Eastern		Ficklin vs. Tarver.....	119
R. W. Co	82	Farmers' Storage and Com. Co.	
Billings vs. Drew.....	107	vs. De Lappe.....	121
Barber vs. Barnes.....	124	Flanders vs. Locke.....	171
Burton vs. Robinson.....	155	Flanders vs. Locke.....	172
Baker vs. Avise.....	157	Frost vs. Meetz.....	256
Baggs vs. Smith.....	223	First Nat. Bank of Barnesville vs.	
Bank of San Luis Obispo vs. John-		W. W. Telegraph Co.....	322
son.....	243	Fonda vs. British-American Ins.	
Bradburn vs. Foley.....	395	Company.....	449
Brine vs. Hartford Ins. Co	443	Green vs. Meyer.....	41
Bergheim vs. Great Eastern R. W.		Green vs. Campbell.....	43
Company.....	451	Green vs. Campbell.....	153
Cal. Cracker Co. vs. Schr. Superior	44	Glidden vs. Robinson	156
Coburn vs. Ames.....	81		
Cox vs. McLaughlin.....	126	Hagar vs. Spect.....	86
Croghan vs. Minor & Spence....	148	Hershey vs. Dennis.....	188
Christie vs. Christie.....	207	Hurd vs. Barnhardt.....	246
Citizens' Nat. Bank vs. Green ...	263	Heins vs. Cargill.....	263
City of Stockton vs. Clark.....	264	Harrison vs. Collins	295
City of Stockton vs. Skinner....	265	Heinlen vs. Martin.....	305
Creighton vs. Evans.....	271	Hampshire vs. Wickens.....	381
Chidester vs. Con. People's Ditch			
Company.....	273	James vs. Center.....	164
Christina Feyhl, Estate of.....	281	Johnson vs. Squires.....	235
City of Sacramento vs. Nat. Gold		Jackson, In re.....	409
Bank of Mills.....	366	Jefferson, Mad. and Ind. R. R.	
Commonwealth vs. Mink.....	366	Co. vs. Esterle.....	432
Cave vs. Crafts.....	482		
Dyer vs. Scalminini.....	3	Kehoe, Estate of.....	3
Davis vs. Russell.....	83	Kraft vs. Driscoll.....	24
Dowd vs. Clark.....	92	Kelley vs. McKibben.....	202
Dorn vs. Howe.....	98	Keller vs. Lewis.....	407
Delphi School District vs. Murray.	145		
Dickinson vs. Adams.....	163	Little York Gold and W. Mining	
Dyer vs. Barstow.....	187	Co. vs. Keyes.....	9
Donohoe vs. Mariposa Land and		Leroy vs. Reeves.....	33
Mining Co.....	211	Luce vs. Zeile.....	109
Dean vs. McDowell.....	322	Lorenz vs. Jacobs.....	174
Duff vs. Williams.....	389	Livingston vs. Morgan.....	209
Dudymott vs. K. P. R. R.....	468	Lamb vs. Walker.....	443
		Lock vs. Chace.....	445

TABLE OF CASES.

PAGE.	PAGE.		
McCreery vs. Duane	25	Reidy vs. Scott.....	165
McCarthy vs. Pope.....	90	Robinson vs. Gleason.....	190
Meeks vs. S. P. R. R. Co.....	96		
Marquhard vs. Wheeler.....	157	Storey vs. Early.....	81
Mahoney M'g Co. vs. Bennett....	162	Snow vs. Kimmer.....	94
McCausland, Estate of.....	182	Stanway vs. Rubio.....	95
McDonald vs. Hazeltine.....	236	Simon Jacobs & Co. vs. Scott....	168
Maxwell vs. Supervisors.....	241	Stockton and L. G. R. Co. vs.	
Mutual Life Ins. Co. vs. Wilcox..	304	Stockton and C. R. R. Co....	170
Meister vs. Moore.....	347	Shafter vs. Evans.....	205
Monterey and Salinas V. R. R. Co. vs. Hildreth.....	404	Smith vs. Lawrence.....	225
Milligan and H. Glue Co. vs. Up- ton.....	446	Santa Cruz R. R. Co. vs. Schwartz.	283
Nisbet vs. Nash.....	102	State of California vs. Townsend.	321
Natoma Water and Mining Co. vs. Bugbey.....	275	State vs. Armington.....	346
New York Life Insurance Co. vs. Eggleson.....	353	Silver vs. Mullan.....	364
Oakley vs. Stuart.....	228	State vs. Bantley.....	402
Pennoyer vs. Neff.....	49	Semple vs. Bank of British Co- lumbia	417
Pacific Transfer Co. vs. Harbor Commissioners.....	82	Spencer, In re.....	494
People vs. Latham.....	93		
People vs. Wong Shu Shut.....	110		
People vs. Thomasson.....	122		
People vs. Moore.....	122	Van Sice vs. Steamer Colima....	326
People vs. McKeller.....	150		
People vs. Methrim.....	151	Watson vs. Cornell.....	106
People vs. Morino.....	152	Woolen vs. Banker.....	135
People vs. Maggie Brown.....	153	Weill vs. Jones.....	147
People vs. Jones.....	248	White T. Jeff. Estate of.....	154
People vs. Royal.....	250	Wanzer vs. Somers.....	167
People vs. Green.....	254	Wentworth & Osborn vs. Miller & Lux.	193
People vs. Bell.....	430	Winters vs. Browner.....	221
People vs. Herrera	442	White vs. University of California.	281
People vs. Pearson.....	462	Wetzlar vs. Fitch.....	311
Pulliam vs. Cherokee Flat Blue Gravel Co.....	108	W. P. R. R. W. Co. vs. Whipple.	313
Pierce vs. Felter.....	185	Wood vs. Orford.....	301
Phipps vs. Harland.....	191	Wooster vs. Paige.....	324
Pullman vs. Upton.....	242	Wilson vs. S. P. R. R. Co.....	362
Parry vs. Kelly.....	421	Waugh vs. Wingfield.....	442
Prescott vs. Salthouse.....	489	Woods vs. Finnell.....	444

Pacific Coast Law Journal.

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MARCH 2, 1878.

No. 1

Current Topics.

THE Senate has just passed the bill providing for the holding of the Constitutional Convention but with the amendment that the delegates shall serve without compensation.

It has long been a question about which men of the best abilities differ, whether the policy adopted by the Senate—that members of Legislative bodies should serve without compensation—is the true one or that they should receive pay commensurate with their labors and loss of time.

To follow the policy expressed by the Senate would undoubtedly shut out from such bodies many honest and able men such as are peculiarly fit for just such duties; men holding the best interest of the State always paramount to other interests but who are entirely unable to serve it without at least compensation equivalent to their expenses and loss of time; and again such a rule in its results permits only the men whom fortune and good luck have placed within its pale to make all laws in exclusion of those more entitled to their benefits and who should have a voice in their enactments. Whether a concentration of capitalists would make a body sufficiently trusty to make laws for the other classes is hardly debateable.

On the other hand, too much compensation would encourage idlers and unworthy men to press claims for membership who are totally unfit for such a duty.

Pay, equal to the expense necessarily entailed upon members should be given, thus allowing all that are earnest to make the race, and the rest must remain with the voters in their choice and selection of suitable representatives.

ABOUT a year ago one Charles J. Frank was arrested for a violation of what is known as the Sample Sellers' License, which requires that if any goods are sold or offered for sale that are not manufactured in the city a license of \$100 shall be charged. Frank took out the usual license to sell jewelry from a fixed place of business, paying for it at the rate of \$5,50 per quarter. In addition to selling the goods he had on hand in the city, he also took orders for gloves, chamois skins, towels, etc., sending the orders to the East to be filled. For this violation of the ordinance he was arrested on complaint of the License Collector, the charge proven against him, and fined \$100 in the Police Court. Immediately after his conviction he appealed his case to the County Court, and after a delay of six or eight months the decision of the lower Court was sustained. He then appealed the case to the Supreme Court, and that tribunal have reversed the decision of the County Court and declared the law inoperative, unreasonable and oppressive.

JUDGE FREEDMAN, of the New York Superior Court, in charging a jury in a case involving the value of a lawyer's services, says :

"To become proficient in the necessary knowledge relating to all these matters involves years of self-denial, close application and devotion, and a study of almost a life-time. A lawyer's compensation is therefore not to be measured merely by the time he actually spends in the discharge of his duties. An advice given in a short interval, but founded upon years of previous acquaintance with the question involved, may, in an important case involving large interests, be worth quite a sum of money."

This should be charged in all similar cases and undoubtedly is the true rule, notwithstanding the popular prejudice against large charges for apparently small service. But when the work done is mechanical simply, then the compensation should only be commensurate with the actual labor performed.

IN the matter of the *Estate of Kehoe* the Supreme Court have affirmed the judgment of the court below.

Kehoe was the executor of the will of William McConnell. Upon a final settlement of his account he was due the estate \$3,876 95. A decree settling the account was made by the Probate Court. Kehoe died before the estate had been distributed. Letters of administration *cum testamento annexo*, were issued to one Cronin who presented the claim of the estate of McConnell against the Kehoe estate, which was allowed by the executor.

Cronin as administrator of the estate of McConnell moved the court upon a final settlement of the Kehoe estate for an order that the claim of said Cronin as administrator be declared as preferred claim. The court refused to allow the claim as a preferred claim.

The question presented is whether the decree settling the final account of John Kehoe as executor of the will of McConnell is a judgment within the meaning of section 1643 of the Code of Civil Procedure so as to entitle the McConnell claim to preference over simple debts.

The respondent claimed also that the order refusing to give any claim a preference is not one of the enumerated cases where appeals may be taken from the judgment or order of the Probate Court.

Dyer vs. Scalminini, was an action upon a street assessment. The court below held that the petition was insufficient and the assessment therefore illegal and void. The petition was in these words:

To the Honorable Board of Supervisors of the City and County of San Francisco:

GENTLEMEN.—Your petitioners respectfully represent to your Honorable Board that they are the owners and agents of the owners and in possession of a majority of the frontage of the lots and lands liable for the expense of the work in said city and county hereinafter mentioned, and they do respectfully request that your Honorable Board do order, etc. *Nelson vs. Doble*, 750 feet frontage. *John R. Spring*, 750 feet frontage, etc.

The only question presented is the sufficiency of the petition to confer jurisdiction on the Board to order the work. Defendants say it is insufficient in form because it omits to state that the parties signing are the owners of the lots named in the petition; that it is bad in substance because it does not show on its face that it represents a majority of the front feet, except by mere assertion.

The Supreme Court affirmed the judgment of the Court below.

WE regret that we have no written opinions of our Supreme Court to publish this week. The Court has been too busy hearing causes to give much time to the deliberation and thought necessary in the proper exercise of those onerous duties. They will hear no other cases, however, this term, except those specially set, so that we may reasonably expect to soon furnish our subscribers with several interesting and important decisions.

IT will be seen that we appear with this issue under our new title, and in a new dress. We have adopted a style and size of type uniform with all publications of this character, and have increased the size of each weekly issue, thus making a volume of six months aggregate 520 pages. We have arranged to print 1000 copies of each number, so that we may not fail to supply any and all missing numbers, as well as to meet the demand that will necessarily be made for this new volume.

The decisions of our State will receive full attention, and each will be prepared with the greatest care, giving the facts in each case.

This volume will comprise decisions of our Supreme Court, that will not be reported officially for nearly two years, and while we do not expect to supersede the publication of the official volumes, we do know that when the profession shall be convinced that our labors are earnest and shall place full confidence in our reports, after close watching, our work will be as highly appreciated and in one particular more valuable, in this, that it contains *all* the decisions, whilst the reports contain only such as are designated by the Court.

U. S. Circuit Court.

DISTRICT OF CALIFORNIA.

HASHIMOTO FOSAYMAN vs. JOHN FOGG TWOMBLEY, Trustee, etc.

Appeal from the Consular Court at Hiogo in the Empire of Japan.

1. **THE RECORD ON APPEAL FROM THE CONSULAR COURT OF JAPAN TO THE CIRCUIT COURT FOR THE DISTRICT OF CALIFORNIA.**—Consists of a transcript of the libel, bill, answer, depositions and all other proceedings in the case.
2. **SAME.**—The transcript should be a single document certified at the end as being a full and correct copy of the proceedings in the case, and authenticated by the official signature and seal of the consul.
3. **LOOSE PAPERS NOT A PROPER RECORD.**—Where on appeal from a Consular Court of Japan the record sent up consisted of a mass of loose, separate papers, some having the appearance of being originals and others of being copies not certified or in any manner authenticated, the appellate court declined to take jurisdiction and dismissed the appeal.
4. **ALLOWANCE OF APPEALS FROM CHINA AND JAPAN.**—In cases of appeal from the Consular and Ministerial Courts of China and Japan to the Circuit Court of the United States for the District of California, the record on appeal must show an allowance of the appeal.
5. **APPEAL—CITATION.**—A citation is necessary unless the appeal is allowed in open court : *Query*, whether a citation is not always necessary, if the Consular Court has once adjourned after rendering a decree, there being no terms of such courts ?

SAWYER, J.

This case purports to be an appeal from the United States Consular Court at Hiogo in the Empire of Japan. The papers having been filed in this Court, counsel appears on behalf of the appellee and moves to dismiss the appeal on the grounds : 1. That no authenticated transcript of the libel, bill, answer, depositions, and other proceedings has been transmitted to, or filed in, this Court, as required by section 4093 of the Revised Statutes ; and, consequently, that there is no authentic record upon which the Court can act. 2.

That the papers filed show no allowance of an appeal. 3. That the papers do not show any citation to, or any service of citation upon the appellee.

The papers filed consist of a mass of separate loose papers, no one of which is certified to be either a copy or the original of any document on file in the Court below. Some would seem to be original documents, but they bear no marks or endorsements showing that they were ever filed in the Consular Court ; others may be copies, but they are not certified to be copies of any part of the papers, records, or proceedings of the Consular Court. The papers, so far as authentication is concerned, might just as well have been brought here and filed by any resident of Japan without ever having been in any Court whatever. There is a personal letter, separate from the other papers, from the Consul addressed to the Judge of this Court, stating that he has transmitted a matter of appeal to this Court. It would, certainly, be very unsafe, even if there was no statute upon the subject, for the Court to assume jurisdiction and act upon such papers, or such a record. But the statute prescribes what the record transmitted shall be ; and that is "a *transcript* of the libel, bill, answer, depositions and all other proceedings in the case."

This transcript should be a copy in chronological order of all the proceedings in the case from the beginning to the end, as a single document, and this should be certified at the end as being a full, true and correct copy of the pleadings, depositions and all other proceedings in the case ; and that the same constitute the transcript on appeal to the Circuit Court ; and it should be authenticated by the official signature and seal of the Consul. The papers used in the Court below should remain there as parts of the record of that Court. The record should, also, show an allowance of the appeal ; and where the appeal is not taken in open court, at the time of the rendition of the judgment or decree, and before adjournment of the court, the record should show a citation to the appellee, and due service thereof to appear in this Court. See *Steamer Spark vs. Lee Cho Chum*, 1 Sawyer's Reports, 713

In that case, upon this point it said : "It is objected that the record shows no order allowing the appeal, and no citation to the appellees. The section cited, it will be seen, provides that 'appeals shall be subject to the rules, regulations and restrictions prescribed in law for writs of error from District Courts of the United States.'

"The twenty-second section of the judiciary act of 1789, provides, that final decrees and judgments of the District Courts in civil actions, 'may be re-examined, and reversed or affirmed in a Circuit Court * * * upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, assignment of errors and prayer for reversal, with a citation to the adverse party, signed by the Judge of such District Court, or a Justice of the Supreme Court, the adverse party having at least twenty days' notice.' (1 U. S. Stat. at L., 84.) The same section has a similar provision for writs of error from the Supreme to the Circuit Court to review the judgments and decrees of the latter. And the twenty-fifth section has provisions in similar language for reviewing the decisions of the highest State Courts in ~~certain~~ cases by the Supreme Court of the United States. The construction of these latter provisions, and consequently the construction of the similar provisions relative to writs of error from the Circuit to the District Courts has been settled by the Supreme Court of the United States. Thus in the very late case of *Gleason vs. Florida* (9 Wal. 783), the Supreme Court say : 'But on looking into the record, we find no allowance of the writ. And this has been repeatedly held to be essential to the exercise by this Court of reviewing jurisdiction over final judgments or decrees by the Courts of the States.' So, in *Hartford Fire Insurance Co. vs. Van Duzer*, the writ was dismissed because no allowance of the writ appeared in the record, the Chief Justice delivering the opinion of the Court, 'that such allowance was indispensable to the jurisdiction of the Court in error to review the judgment of the highest Court of the State.' (9 Wall, 784.) So, an appeal from the Supreme Court of the District of Columbia was

dismissed by the Supreme Court of the United States, because there was 'no evidence in the record of any allowance of appeal, and without an allowance this Court cannot acquire jurisdiction.' (*Pierce vs. Cox*, 9 Wall, 787; see, also, *Edmonson vs. Bloomshire*, 7 Wall, 312. This settles the construction of the Act of Congress relating to writs of error, and appeals from the United States District Courts, and as the same rules and regulations are made applicable to appeals from the Consular Courts of China and Japan, it settles the point in this case. The record shows no allowance of an appeal, and no citation, the latter being necessary, also, if the order allowing an appeal is not made in open Court. This is implied, at least, from the case of *Pierce vs. Cox* (*supra*), if a citation is not waived by appearance of the appellee. And it is expressly required by the provisions of the statute quoted.

"It is claimed, also, that this appeal, if taken at all, must have been taken out of Court, as the petition for an appeal bears date several days after the date of the judgment; and it is claimed that there are no terms in the Consular Court, under the statute, and that as soon as judgment is entered, and the Court for that occasion has adjourned, it is no longer an open Court with reference to that case, and all subsequent allowances of appeals, must, necessarily be made out of Court, with respect to that case. Numerous authorities are cited to the point, but it is unnecessary now to determine it, upon the view taken, upon other objections. It will be the safer practice to issue and serve a citation."

I regret the necessity of dismissing the appeal in a case brought so far, but there is no record here upon which the Court can take jurisdiction.

Appeal dismissed with costs.

United States Supreme Court.

[October Term, 1877.]

LITTLE YORK GOLD WASHING AND WATER CO.,
(Limited), et al., Plaintiff's in Error,

vs.

JAMES H. KEYES.

In error to the Circuit Court of the United States for the District of California.

REMOVAL OF CAUSES.—CONSTRUCTION OF THE ACT OF MARCH 3d, 1875.—Before a Circuit Court can be required to retain a cause under the jurisdiction conferred by the Act of 1875, for the removal of causes from State Courts it must in some form appear upon the record by a statement of facts in legal and logical form such as is required in good pleadings that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States. The record in this case is insufficient.

Mr. Chief Justice WAITE delivered the opinion of the Court.

This was a suit in the nature of a bill in equity, commenced July 29, 1876, in a state court of California, by Keyes, the defendant in error, and the owner of certain agricultural lands situated on Bear river, against the plaintiffs in error, who were engaged in hydraulic mining upon the highlands adjacent to that river and its tributaries, to restrain them from depositing the tailings and debris from their several mines in the channel of the river. The defendants demurred to the complaint, and, before the term at which the cause could be first tried, filed their petition, accompanied by the necessary bond, for the removal of the suit to the Circuit Court of the United States for the District of California, under the provisions of the act of March 3, 1875—(18 Stat. 470.) The material parts of the petition, which was otherwise in due form, are as follows :

"Your petitioners further represent that they are gold-bearing placer mines situated in the counties of Placer and Nevada, in said State of California, which they claim under the laws of the United States, and engaged in working the same by what is known as the hydraulic process of mining ; that said hydraulic process necessarily requires the employment of large heads or streams of water, used through pipes or hose, under heavy pressure, for the purpose of loosening or washing the gold-bearing earth and gravel contained in said mining claims, into large flumes, where the gold is separated from the earth by the action of the water, and is retained. That the gold in said claim are distributed in very fine particles throughout the entire gravel deposit, and cannot be obtained in any other manner, nor can said mining claims of your petitioners be worked in any other manner save by said hydraulic process ; that in working said mines your petitioners necessarily deposit in the channels of Bear river and its tributaries large quantities of tailings from said mines ; that the said Bear river and its tributaries are the natural and only outlets for said hydraulic gold mines, and your petitioners claim the right to work, use, and operate said mines, and in so doing to use the channels of Bear river and its tributaries as a place of deposit for their said tailings, under the provisions of the act of Congress of the United States, entitled 'An act granting the right of way to ditch and canal owners over public lands, and for other purposes,' passed July 26th, 1866, and the act amendatory thereof, passed July 9th, 1870, and the 'Act to promote the development of the mining resources of the United States passed May 10th, 1872, and other laws of the United States

"That said action arises under, and that its determination will necessarily involve and require the construction of the laws of the United States above mentioned, as well as the pre-emption laws of the United States. That the mines of your petitioners are of great value, to wit, of an aggregate value of not less than ten millions of dollars ; and that if your petitioners are prevented from using said channels of Bear river and its tributaries as outlets for their said tailings and water, their said mines will be thereby rendered wholly valueless."

The State Court accepted the petition and bond and transferred the suit, but the Circuit Court remanded it on the ground that no real or substantial controversy, properly within the jurisdiction of that court, appeared to be involved. To obtain a review of this action of the Circuit Court the present writ of error has been brought, under the provision of section 5 of the act of 1875, which gives authority for that purpose.

It is well settled that in the courts of the United States the special facts necessary for jurisdiction must in some form appear in the record of every suit, and that the right of removal from the State Courts to the United States Courts is statutory. A suit commenced in a state court must remain there until cause is shown under some act of Congress for its transfer. The record in the State Court, which includes the petition for removal, should be in such a condition when the removal takes place as to show jurisdiction in the court to which it goes. If it is not, and the omission is not afterwards supplied, the suit must be remanded.

The attempt to transfer this cause was made under that part of section 2 of the act of 1875, which provides for the removal of suits "arising under the Constitution or laws of the United States." In the language of Chief Justice Marshall, a case "may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either," (Cohens vs. Virginia, 6 Wheat., 379,) or when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction."—(Osborne vs. U. S. Bank, 9 Wheat. 822.)

The question of jurisdiction was submitted to the circuit court upon the record sent from the state court. Upon the pleadings alone it is clear the defendants had not brought themselves within the statute. The complaint simply set forth the ownership by Keys of his property, and the acts of the defendants which, it was claimed, created a private nuisance. No rights were asserted under the Constitution or laws of the United States, and nothing was stated from which it could in any manner be inferred that the defendants sought to justify

the acts complained of by reason of any such authority. The defendants in their demurrer, which set forth specifically the grounds relied upon, presented no question of federal law. The validity of the judgment of the circuit court, therefore, depends upon the sufficiency of the facts set forth in the petition for removal.

For the purposes of the transfer of a cause, the petition for removal which the statute requires, performs the office of pleading. Upon its statements in connection with other parts of the record the courts must act in declaring the law upon the question it presents. It should, therefore, set forth the essential facts, not otherwise appearing in the case, which the law has made conditions precedent to the charge of jurisdiction. If it fails in this it is defective in substance, and must be treated accordingly. Thus, in *Phoenix Ins. Co. vs. Pechner*, at the present term, we have decided that a petition for removal on account of the citizenship of the parties did not divest the state court of its power to proceed, because when taken in connection with the pleadings and process in the cause, it failed to show such citizenship at the time of the commencement of the action as would give the circuit court jurisdiction. And in *Amory vs. Amory* we held to the same effect in reference to a petition which failed to set forth the personal citizenship of the parties.

The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions of the parties to state the premises.

In this petition the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that can be only worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of, and they allege that they claim the right to this use under the provisions of certain specified acts of Congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts to show the right

they claim or to enable the court to see whether it necessarily depends upon the construction of the statutes.

Certainly an answer or plea, containing only the statements of the petition, would not be sufficient for the presentation of a defence to the action under the provisions of the statutes relied upon. The immunities of the statutes are, in effect, conclusions of law from the existence of peculiar facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it *is* in operation will not be enough, for that is the precise question the court is called upon to determine.

The statutes referred to contain many provisions, but the particular provision relied upon is nowhere indicated. A cause cannot be removed from a State Court simply because, in the progress of the litigation, it may become necessary to give a construction of the Constitution or laws of the United States. The decision of the case must depend upon the construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. That this was the intention of Congress is apparent from section 5 of the Act of 1875, which requires the Circuit Court to dismiss the cause or remand it to the State Court, if it shall appear, "at any time after such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court."

Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction it must in some form appear upon the record, by a statement of facts "in legal and logical form," such as is required in good pleading, (1 Chit. Pl., 213,) that the suit is one which "really and substantially involves a dispute or controversy" as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States. If these facts sufficiently appear in the pleadings, the petition for removal need not restate them, but if they do not, the omission must be supplied in some form, either by the petition or otherwise. Under the application of

this rule we think that the record in this case is insufficient, and that the Circuit Court did not err in remanding the cause.

The act of 1875 has made some radical changes in the law regulating removals. Important questions of practice are likely to arise under it which, until the statute has been longer in operation, it will not be easy to decide in advance. For the present, therefore, we think it best to confine ourselves to the determination of the precise question presented in any particular case, and not to anticipate any that may arise in the future. Under these circumstances the present case is not to be considered as conclusive upon any question except the one directly involved and decided.

The judgment is affirmed.

BRADLEY, J.,—Dissenting Opinion,—

The question intended to be raised in this case is, whether the grants made by the United States of placer mines as such, involve the right to discharge the refuse earth and gravel produced by working said mines, called tailings, into the neighboring streams, (in this case Bear river,) inasmuch as the mines cannot be worked except by means of a discharge of the streams of water loaded with such refuse. This question depends upon the construction of the titles given by the United States. When the government determined to sell mining property as such, and placer mines *co nomine*, did it, or did it not, intend to confer a right of working them in the only way in which they could be worked? It seems to me that the question is clearly raised by the allegations of the petition in this case; and the claim of the right is clearly made. Whether it can be maintained as against the occupants of inferior lands in the valleys which may be injured thereby is another question not now before us. I think the parties were entitled to a removal of the cause.

Recent Decisions.

Supreme Court of the United States.

[October Term, 1877.]

THE UNITED STATES, APPELANTS, vs. THE NATIONAL BANK OF BOSTON.

Appeal from the Court of Claims.

Mr. Justice SWAYNE delivered the opinion of the Court.

Upon analyzing this case as it is presented in the record the facts are found to be few and simple.

Hartwell was cashier of the sub-treasury in Boston. He embezzled a large amount of money belonging to the United States by lending it to Mellen, Ward & Co. As the time for the examination of the funds of the sub-treasury approached, Mellen, Ward & Co. endeavored to tide Hartwell over the crisis and to conceal his guilt and their own by the devices out of which the controversy has arisen. They had sold to the Mercantile National Bank of Boston a large amount of gold certificates, with the understanding that they might buy back the like amount by paying what the bank had paid, and interest at the rate of six per cent. per annum. Carter, one of the firm, arranged with Smith, the cashier of the plaintiff, to buy from the Merchants' Bank gold certificates to the amount of 420,000, and to pay for them with the checks of Mellen, Ward & Co., certified to be good by Smith, as such cashier, and then to deposit the certificates in the sub-treasury, where they were to remain until the ensuing day. A receipt was to be taken from the proper sub-treasury officer. The certificates were bought, paid for, and deposited accordingly. Hartwell received them from Smith, in the presence of Carter, and made out the receipt to Mellen, Ward & Co., or order. Smith inquired why the receipt was made out to them. Carter there-

upon endorsed it by the firm name to Smith as cashier, and Smith took it without further remark.

Subsequently, pursuant to a like arrangement between the same parties, Smith, as such cashier, made a further purchase of gold and gold certificates from the Merchants' Bank, and converted the gold into gold certificates. The aggregate of the certificates thus procured was \$60,000. Thereafter Smith, as such cashier, at the instance of Carter made a further purchase of gold certificates from another bank to the amount of \$100,000. All these certificates, amounting to \$160,000, were also deposited by Smith in the sub-treasury, in the presence of Carter, and a receipt taken and endorsed as before, to Smith as cashier. The receipts specified that the certificates deposited were "to be exchanged for gold certificates or its equivalent on demand." Only \$60,000 of the last deposit is claimed by the appellee. The residue is not involved in this controversy. The total claimed is \$480,000. All these things occurred on the 28th of February, 1867. On the following day Smith presented the receipts at the sub-treasury, and payment was refused. The certificates were all canceled and sent to the proper officer at Washington. The gold which they represented has since remained in the treasury of the United States. Carter gave Smith plausible reasons, not necessary to be repeated, for desiring to make the deposits. The Court of Claims found these facts: . * * * * "He (Carter) submitted his plan to Hartwell, which was as follows: He proposed to buy gold certificates in New York, bring them to Boston, and borrow money upon them of the Merchants' Bank, and he then proposed to get Smith, the cashier of the State Bank, to pay for these certificates and leave them with Hartwell during the examination. Hartwell made no objection to this plan, but he thought Smith would not do it. The plan was carried into effect by Carter, as hereinbefore set forth, but Hartwell had no agency in carrying it out, except to receive the moneys and gold certificates paid to him on the 28th of February as aforesaid, and he had no actual knowledge of the proceedings taken by Carter on that day to obtain said gold certificates. When Carter and Smith deposited the \$420,000

of gold certificates in the sub-treasury as aforesaid, Smith did not know Hartwell, nor did Hartwell know Smith; or know that Smith was connected with any bank or money institution."

The case under another aspect was before us on a former occasion. *Merchants' Bank vs. The State Bank*, 10 Wall., 604. We there held, after the most careful consideration, that the legal title to the certificates was, by the purchases made by its cashier, vested in the State Bank. We find no reason to change this view. The finding of the court shows clearly that Hartwell knew when he received the certificates that they did not belong to Mellen, Ward & Co., and that they did belong to the plaintiff, and that Smith represented the plaintiff as its agent. Hartwell was privy to the entire fraud from the beginning to the end, and was a participant in its consummation.

It is not denied that Smith acted in entire good faith. What he did was honestly done, and it was according to the settled and usual course of business. Hartwell was the agent of the United States. He was appointed by them and acted for them. He did, so far as Smith knew, only what it was his duty to do, and what he did constantly for others, and it is not denied that it was according to the law of the land. 12 Stat. 711. Smith no more suspected fraud, and had no more reason to suspect it, than any other of the countless parties who dealt with the sub-treasury in like manner.

There could hardly be a stronger equity than that in favor of the plaintiff. It remains to consider the law of the case.

The interposition of equity is not necessary where a trust fund is perverted. The *cestui que trust* can follow it at law as far as it can be traced. *May vs. Leclere*, 11 Wall., 217; *Taylor vs. 3 Maul & Sel.* 562.

Where a draft was remitted by a collecting agent to a sub-agent for collection, and the proceeds were applied by the sub-agent in payment of the indebtedness of the agent to himself, in ignorance of the rights of the principal, this court held that, there being no new advance made and no new credit given by the sub-agent, the principal was entitled to recover against

him. *Wilson & Co. vs. Smith*, 3 How., 753; see, also, *Bank of the Metropolis vs. The New England Bank*, 6 How., 212.

A party who, without right and with guilty knowledge, obtains money of the United States from a disbursing officer, becomes indebted to the United States, and they may recover the amount. An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. *Bayne et al. vs. The United States*, 3 Otto. 643.

The United States must use due diligence to charge the endorsers of a bill of exchange, and they are liable to damages if they allow one which they have accepted to go to protest. *United States vs. Barker*, 12 Wheat., 560; *Bank U. S. vs. The United States*, 2 How., 711; *United States vs. Bank of the Metropolis*, 15 Pet., 378.

In these cases and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved. •

The cases of the *Atlantic Bank vs. The Merchants' Bank*, 10 Gray, 532, and *Skinner vs. The Merchants' Bank*, 4 Allen, 290, are in their facts strikingly like the case before us, and they involved exactly the same point. It was held in each of those cases, after an elaborate examination of the subject, that the defrauded bank was entitled to recover.

But surely it ought to require neither argument nor authority to support the proposition that where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.

The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty and could confer no rights upon his principal.

The appellee recovered below the amount claimed. A different result here would be a reproach to our jurisprudence.

The judgment of the Court of Claims is affirmed.

Supreme Court of the United States.

ABSTRACT OF DECISIONS.

Agency.

1. PRINCIPAL CANNOT RETAIN PROPERTY ACQUIRED THROUGH FRAUD OF AGENT: ACTS OF GOVERNMENT OFFICER.—Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party. Judgment of Court of Claims affirmed.

United States, appellant, v. State National Bank of Boston.
Opinion by Swayne, J.

2. MEANS BORROWED TO COVER DEFALCATION.—A firm had borrowed money, belonging to the government, from the cashier of its sub-treasury. In order to enable the cashier to cover up his violation of duty, and in pursuance of an agreement, one of the firm procured a bank officer to purchase gold certificates, which were to be deposited in the sub-treasury, to remain to the subsequent day. The bank officer did so, and a receipt for the certificates was given by the cashier to C, who indorsed it to the bank officer. The receipt entitled its owner to receive gold certificates for those deposited, or their equivalent, on demand. The bank officer had no knowledge of the plan of the firm and the cashier, and the transaction he entered into was a usual one. *Held*, that the government obtained no title to the certificates, but was liable to return their value to the bank. Ib.

Carrier of Passengers.

WHO IS NOT A GRATUITOUS PASSENGER: STIPULATION ON TICKET AGAINST CARRIERS' NEGLIGENCE INVALID.—Plaintiff below was negotiating, at Portland, Me., with defendant below, a railway company, for the introduction on its road of a patent car coupling, and was requested by defendant to go

to Montreal and see one of its officers there, defendant agreeing to pay his expenses. He was given a pass directing conductors to pass him from Portland to Montreal. The pass contained this condition: "The person accepting this free ticket in consideration thereof assumes all risk of all accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare." While traveling from Portland to Montreal, on this pass, on one of defendant's trains, plaintiff was injured by defendant's negligence. *Held*, (1) that plaintiff was carried for hire, in pursuance of an agreement, and not as a gratuitous passenger; (2) that it was not competent for defendant to stipulate against liability for its own negligence in such a case, and it was liable for the injury. *Railroad Co. vs. Lockwood*, 17 Wall. 357. Judgment of Circuit Court, Maine, affirmed. *Grand Trunk R. R. Co., plaintiff in error, vs. Stevens*. Opinion by Bradley, J.

National Bank.

INDEBTEDNESS TO, FOR MORE THAN ONE-TENTH OF CAPITAL RECOVERABLE.—Defendant became indebted to plaintiff, a national bank, to an amount exceeding one-tenth of the capital stock of such bank. *Held*, that the provision of the national banking law (§ 27) forbidding the liabilities of any one person, firm or corporation to a national bank to exceed one-tenth of the capital stock paid in of such bank, did operate to avoid the contract of indebtedness incurred by defendant, and plaintiff was entitled to recover the amount due. *Harris vs. Runnels*, 12 How. 791; *O'Hare vs. Second Nat. Bank of Titusville*, 77 Penn. St. 96; *Pangburn vs. Westlake*, 36 Iowa, 546; *Vining vs. Bucker*, 14 Ohio St 331. Judgment of Supreme Court of Colorado affirmed. *Union Gold Mining Co., plaintiff in error, vs. Rocky Mountain Nat. Bank*. Opinion by Hunt, J.

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Current Topics.

AN important decision has been rendered by the Supreme Court of the United States in the case of *Pennoyer vs. Neff* in error to the Circuit Court of the U. S. District Court of Oregon. The following is a synopsis of the decision :

1.—A statute of Oregon, after providing for service of summons in an action upon parties or their representatives personally or at their residence, declares that when service cannot be thus made and the defendant, after due diligence, cannot be found within the state, and “that fact appears, by affidavit, *to the satisfaction of the court or judge thereof, and it, in like manner*, appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in the state, such Court or judge may grant an order that the service be made by publication of summons

* * * when the defendant is not a resident of the state but has property therein and the Court has jurisdiction of the subject of the action”—the order to designate a newspaper of the county where the action is commenced in which the publication shall be made—and that proof of such publication shall be “the affidavit of the printer, or his foreman, or his principal clerk :” *Held*, that defects in the affidavit for the order can only be taken advantage of on appeal or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally ; and that the provision as to proof of the publication is satisfied when the affidavit is made by the editor of the paper.

2.—A personal judgment rendered in a state court in an action upon a money demand against a non-resident of the

state, without personal service of process upon him within the state, or his appearance in the action, upon service by publication, is without any validity ; and no title to property passes by a sale under an execution issued upon such a judgment

3.—The state having within its territory property of non-residents may hold and appropriate it to satisfy the claims of its citizens against them, and its tribunals may enquire into their obligations to the extent necessary to control the disposition of the property. If non-residents have no property in the state, there is nothing upon which the tribunals can adjudicate.

4.—Substituted service by publication, or in any other authorized form, is sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the Court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent, and proceeds upon the theory that its seizure will inform him, that it is taken into the custody of the Court, and that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose.

5.—Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them ; and publication of process or notice within the State in which the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability.

6.—Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states, where actions are

brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the Court and subjected to its disposition by process adopted for that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein ; in other words, where the action is in the nature of a proceeding *in rem*.

7.—Whilst the Courts of the United States are not foreign tribunals in their relations to the State Courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State Courts only the same faith and credit which the Courts of another State are bound to give them.

8.—The terms "due process of law," when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution to pass upon the subject-matter of the suit, and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

The decisions of California have not gone quite so far in their construction of the statute relating to the manner of proof of publication. In *Sharp vs. Dangney* 33 Cal., the Court say that an affidavit by the "publisher and proprietor" is sufficient, and in *Quivey vs. Porter* 37 Cal., they say "printer" and "proprietor" are synonymous in the sense of the statute ; but the Court have never yet held that the affidavit made by an "editor" is sufficient. It will be observed that the Oregon statute is the same as the California statute, and the construction given the Oregon statute is applicable to our own.

But the other feature of the decision will prove to be all important as it seems to be a death stroke to the system of rendering personal judgments against non-residents upon default after publication of summons.

WE published in full (S. F. LAW JOURNAL No. 1, Vol. 1) the opinion of the Supreme Court in the case of *McCreery vs. Sawyer*. It was an action of ejectment. The issues raised and determined by the case were : 1. As to the adversion in evidence of the deed from the city to county of San Francisco to the plaintiff. 2. That it was not shown by plaintiff *debors* the deed and its recital that it was a beneficiary under the act of Congress. 3. As to the possession of the defendant. 4. As to the plea of the statutes of limitation. The court held that inasmuch as the defendant did not appear to have any claim to the title he was in no position to litigate the question ; that defendant did not state that his possession was *bona fide* and his offer did not show that he was in possession on the 8th day of March 1866 ; and that his plea of the Statute of limitations was bad.

We now give the opinions in two other cases involving the same points with additional ones which we believe, together with the unreported and unwritten opinion in the case of *Kraft vs. Driscoll* included about all the defenses that can be made against the deeds made by the city and county under the act of March 1866 and the subsequent acts of the Legislature. In *Kraft vs. Driscoll* it was contended by the plaintiff who brought suit to quiet title that he being in possession on the 8th day of march 1866, (but the finding was to the contrary) was a ~~ben~~eficiary under the Act and entitled to a deed, and that the deed from the city and county to defendants was a nullity and should be excluded. That the city and county through the Board of Snpervisors or by the Mayor could not make a deed for the want of power. That the deed in this case was made before any authority had been conferred by the Legislature ; that the Act of Congress granted the lands to the city corporation in trust to be disposed of and conveyed to parties in *actual possession* and upon such terms as the Legislature of the State might prescribe ; that the defendant did not proceed under ordinance 890 but under 733 which was repeated. The date of the deed was Nov. 8, 1869.

The action was a direct attack against the validity of the deed, but the Court sustained the ruling of the Court below

in admitting it and giving judgment for the defendants. We give the other opinions below.

[No. 5437.]

[Filed August 23d.]

MC CREEERY vs. DUANE.

1. The objections to the introduction in evidence of the deed from the city to McCreery were properly overruled. (*McCreery vs. Sawyer*, No. 5136, at the present term.)

2. The only other point relied on by the appellant arises upon the following portion of the bill of exceptions : "And the defendant, John Duane, then offered to prove that neither the plaintiff nor his grantor was in the *bona fide* possession of the said land on the 8th day of March, 1866, nor any one for them, which evidence was offered for the purpose of attacking said deed from the city ; but said defendant did not propose or offer to prove in connection with said offer that he, said Duane, had complied with the terms and conditions of said ordinances or acts of the Legislature ; but the evidence so offered was excluded by the Court."

Upon the views just announced in *McCreery vs. Sawyer* (*supra*) this ruling was correct.

Judgment and order affirmed. Remittitur forthwith.

[No. 5187.]

[Filed August 23d.]

MC CREEERY vs. DUANE.

1. The objection to the introduction in evidence of the conveyances running from the city and county of San Francisco to McCreery and others and to Doll, respectively, and the ground of the motion for a nonsuit, are the same appearing in *McCreery vs. Sawyer* (No. 5136), just decided, and our views upon these points announced in that case need not be repeated in this case.

2. The defendant offered to prove that they had been in the actual, exclusive and adverse possession of the demanded

premises for five years next before the filing of the complaint herein and the exclusion of the evidence thus offered is the only supposed error remaining to be considered.

The answer of the defendants was a mere denial of the allegations contained in the complaint.

There was no attempt whatever, even such an one as was made in *McCreery vs. Sawyer*, to plead the statute of limitations—nor was any affirmative defense whatever set up in the answer.

In this condition of the pleadings the proof offered by the defendants, even if amounting to anything in itself, was correctly excluded.

Judgment and order affirmed. Remittitur forthwith.

SECTION 49 of the Civil Code as amended passed both houses and is before the Governor for his signature. It provides for six terms of the Supreme Court in each year commencing on 2nd Mondays in January, April, May, July, October and November. The January and July Terms will be held at San Francisco, the April and October Terms at Los Angeles and the May and November Terms at the State Capital. Separate records to be kept at each place of holding the terms.

THE Assembly refused to concur in the amendments made by the Senate to the Constitutional Convention bill and the Senate has passed a resolution for a free conference concerning it.

We sincerely trust that these dilatory measures are not meant to defeat the bill as much is looked for in the anticipated change in the judiciary system of the State to result in some plea for the more speedy determination of causes in the various Courts.

Supreme Court of California.

[January Term, 1877.]

[No. 10,316.]

[Filed March 1, 1878.]

EX PARTE FRANK ON HABEAS CORPUS.

MUNICIPAL CORPORATIONS—Powers of—A Municipal Corporation is the creature of the Statute invested with such power and capacity only as is conferred by the statute or passed by necessary implication.

SAME—In construing the words of the grant the whole chapter and the general legislation of the State respecting the matter must be consulted in order to determine whether by the terms “license and regulate” it was intended to authorize licenses for purposes of revenue. Acting on this rule of interpretation it is held that the act giving power “to license and regulate trades, callings and employment as the public good may require to be licensed and regulated” confers power to exact license fees for purposes of revenue.

SAME—But an ordinance passed under a general authority of this nature must be—1. reasonable, consonant with the general powers and purposes of the corporation and not inconsistent with the laws or policy of the State. 2. it must not be oppressive; 3. it must be impartial, fair and general; 4. it may regulate but must not restrain trade or contravene public policy.

SAME—Statement of case—Frank was convicted of a misdemeanor for violation of what is known as the Sample Sellers Ordinance and being restrained of his liberty upon process issued upon the judgment of conviction was before the Court on a writ of habeas corpus. The ordinance provides in effect that any person who shall sell or solicit for the sale or purchase of any goods, wares, merchandise, etc., without at the time having the goods at or in the city and county of San Francisco or a bill of lading of a common carrier showing the goods are in transitu to said city and county shall pay a license of \$2,000 per quarter for every \$250,000 of business done and then establishes other proportions. But the ordinance provides also for licensing other persons for buying and selling the same character of goods that are within the corporate limits of said city and county, fixing the fees at \$100 per quarter for the same amount of business. *Held* that the ordinance is flagrantly unjust, oppressive, unequal and partial. It contravenes public policy and obstructs commercial intercourse between the principal seaport city of the State and the interior, and is in restraint of trade, and is therefore inoperative and void.

The petitioner having been convicted of a misdemeanor for the violation of what is known as the “Sample Seller’s Ordin-

ance" of the City and County of San Francisco, and being restrained of his liberty upon process issued upon the judgment of conviction is before us on a writ of *habeas corpus*, and claims that he is entitled to be discharged from custody, on the ground that the ordinance is unconstitutional and void.

The ordinance in effect provides that any person who, in the city and county of San Francisco, shall sell, or contract to sell, or cause to be sold, or solicit for the sale or purchase of any goods, wares, merchandise, distilled liquors, or drugs or medicines, jewelry, or wares of precious metals or stones, or any other property of any kind, except wheat, wine, wool brandy, agricultural productions in the raw state, and imports of foreign goods, wares and merchandise upon which duties have been paid or secured to be paid to the United States, and which have never been sold in the United States and are still in original packages, whether on commission or otherwise, without, at the time, having the goods at or in the said city and county or a bill of lading or receipt of a common carrier, showing on its face that the goods named therein have been shipped and are *in transitu* to said city and county "shall pay a license in proportion to the amount of business done by him or them as follows :" The ordinance then provides that those doing business to the amount of \$250,000 and over per quarter, shall constitute the first class and shall pay a license fee of \$2,000 per quarter, and then establishes seven other classes, according to the amount of business done, regulating the license fee to be paid by the amount of business done. Another chapter of the same ordinance provides for licensing persons engaged in the same general business of buying and selling the same kinds of merchandise within the corporate limits, and divides them into several classes, according to the amount of business done, but the license fee to be paid in this class of cases is far less than is exacted for a sample-sellers license. For example, the merchant whose goods are within the corporate limits, and who does a business to the amount of \$250,000 per quarter, is required to pay a license fee of \$100 per quarter, while a merchant engaged in the same business, but whose goods are not within the corporate limits, or actually

in transitu to San Francisco, under a bill of lading, and whose business amounts to \$250,000 per quarter, is required to pay a license fee of \$2,000 per quarter—just twenty times more in the latter case than in the former. About the same ratio of inequality pervades all the other classes established by the ordinance. The result is that a merchant whose business it is to sell goods which at the time of the transaction are not actually within the corporate limits or *in transitu* under a bill of lading, is required to pay about twenty times more for the privilege of pursuing his avocation than another merchant doing business in the same city and who deals in the same kinds of merchandise, but who buys and sells only goods which are actually within the corporate limits or *in transitu* under a bill of lading. The discrimination is made to depend solely on the fact that in the one case the goods are either within the corporate limits or *in transitu* under a bill of lading, and in the other case they are not.

It is contended on behalf of the petitioner that the ordinance violates several provisions of the Federal Constitution, and particularly that which confers upon Congress the power to regulate commerce with the foreign nations and among the several States. But we do not find it necessary for the purposes of this decision to examine the questions of Constitutional law which have been so ably and elaborately discussed by counsel, and shall rest our judgment on other grounds. "A municipal corporation is the creature of the statute invested with such power and capacity only as is conferred by the statute, or passes by necessary implication from the statutory grant." *Herzo vs. San Francisco*, 33 Cal., 143. *Argenti vs. San Francisco* 16 Cal., 282. *Wallace vs. San Jose*, 29 Cal., 180. *Dillon on Municipal Corporations*, section 55, *et seq.*; *Cooley on Const. Lim.*, 191 to 195.

It becomes material therefore to inquire what powers have been conferred upon the Board of Supervisors of San Francisco in respect to licensing occupations. By the third section of the Act of March 30, 1872 (*Statutes 1871-2*, 736) it is provided that the Board of Supervisors shall have power, by ordinance, "to license and regulate all such callings, trades and

employments as the public good may require to be licensed and regulated, and as are not prohibited by law." When the power conferred upon the corporation, as in this case, is to "license and regulate" callings and occupations, a question has sometimes arisen in the courts, whether under such a grant of power, the corporation could exact license fees for purposes of revenue, or should be limited to a sum reasonably sufficient to defray the expense of granting the license. (*Dillon on Mun. Corp.*, § 291.)

But the rule, as stated by Judge Dillon, is, that in construing the words of the grant, the whole charter and the general legislation of the State respecting the subject matter, must be consulted in order to determine whether by the terms "license and regulate" it was intended to authorize licenses for purposes of revenue. Acting on this rule of interpretation, we are of opinion, that it was intended to authorize the City and County of San Francisco to exact license fees as a source of revenue. There are, however, certain rules adopted by the Courts in construing the ordinances of a municipal corporation, passed under a general power conferred by statute on the corporation to pass ordinances on a given subject, which it is necessary to consider. An ordinance passed under a general authority of this nature must be, first, "reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State ;" second, it must not be oppressive ; third, it must be impartial, fair and general ; fourth, it may regulate, but must not restrain trade. (*Dillon on Mun. Corp.*, § 253 to 257 inclusive, and authorities there cited).

By its charter the city of St. Louis was authorized to establish markets, market places and meat shops, provide for the government and regulation thereof, and the amount of licenses to be paid therefor, and to regulate the vending of meat, etc. A city ordinance was passed which prohibited any person, not being the lessee of a butcher's stall, from selling, or offering for sale any fresh meat in quantities less than one quarter. In *St. Louis vs. Weber*, 44 Mo. 547, this ordinance was assailed on the ground that it was an unreasonable exercise by the

city council of the authority granted by the charter, and was therefore void. But while upholding the ordinance as not unreasonable, the Court states the rule applicable to this class of cases with clearness and precision: "If this ordinance is unequal, oppressive and unjust; if it be not a legitimate regulation of the vending of meat, but partial and unfair, establishing monopolies, or subjecting either the seller or purchaser to unnecessary inconvenience or expense, it certainly should not be upheld. In assuming, however, the right to judge of the reasonableness of an exercise of corporate power, courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will be always exercised with the highest discretion, and when it is plainly granted a clear case should be made to authorize an interference on the ground of unreasonableness." This, we think, is the true rule; and it proceeds upon the theory, that under a general grant of power to a municipal corporation to pass ordinances on a given subject, it will be presumed that it was not intended to clothe it with power to pass an ordinance which is clearly unreasonable, unjust, oppressive, partial and unfair, or which contravenes public policy, or is in restraint of trade. But an ordinance will not be pronounced invalid by the Courts on either of these grounds, unless in a plain case. It is, however, for the Court, and not for the jury, to pass upon the validity of the ordinance. (*Dillon on Mun Corp.*, § 261).

Tested by these rules, the "Sample-sellers' Ordinance," now under review, must be held to be inoperative and void. It is obnoxious to all the objections above enumerated. It is flagrantly unjust, oppressive, unequal and partial. It discriminates between merchants in the same place, dealing in the same kinds of merchandise, for no better reason than that one deals in goods either actually in the corporate limits, or *in transitu* under a bill of lading, while the other deals in goods outside the corporate limits, and not *in transitu*, under a bill of lading. If this kind of discrimination be legitimate and valid, there is no reason why a merchant having his goods in a warehouse on a particular street might not be required to pay a license fee

of \$10,000, while another merchant doing the same kind of business in the same city, and with his goods stored on another street, would be required to pay only \$10. It also contravenes the public policy of the State, in that it obstructs commercial intercourse between the principal seaport city of the State and the interior; the policy being to foster and encourage commercial intercourse and a free interchange of commodities between the several sections. It is in restraint of trade, in that it exacts a heavy tribute from the owner of goods outside the corporate limits and not in *transitu*, as a condition on which he will be allowed to offer them for sale in the principal city and seaport of the State. But we need not multiply arguments to show the infirmities of this ordinance.

In the case of *Mayor, etc., vs. Althrop*, 5 *Coldwell*, (Tenn.) *R.*, 554, the Supreme Court of Tennessee, in an able and learned opinion, discuss the validity of an ordinance very similar to that now under review, and hold it to be void on the grounds to which we have adverted.

We are of opinion that the so-called "Sample Sellers' Order" is invalid, and that the prisoner is illegally restrained of his liberty.

Ordered that he be discharged from custody.

CROCKETT, J.

We concur:

{	RHODES, J.
}	NILES, J.
{	McKINSTRY, J.

U. S. Circuit Court.

DISTRICT OF CALIFORNIA.

THEODORE LEROY vs. JOHN H. REEVES.

1. **VOID TAX DEED.**—A tax deed of a sheriff made in pursuance of a sale under a judgment for taxes reciting a sale of real property to the highest bidder, where the statute only authorized a sale of the smallest portion of the property which any one would take and pay the judgment and costs, is void upon its face.
2. **TAX SALE TO PARTY IN POSSESSION INEFFECTUAL.**—Where a party is in possession of and claiming title at the time when a tax levy is perfected, and the tax becomes delinquent, and when judgment for the tax is rendered, it is his duty to pay the tax. He cannot under such circumstances acquire an outstanding title by neglecting to pay the tax on judgment, and purchasing at the sale for taxes under the judgment.
3. **STATUTE OF LIMITATIONS. DISABILITY.**—Where a right of action to recover land accrues during the minority of the owner, the statute of limitations of California does not begin to run against the action till the owner attains majority.
4. **SAME.**—In such case the owner upon attaining majority may convey the land, and the grantee may maintain an action against the disseizer entering during the minority of the owner, at any time within five years after the disability terminates.

SAWYER, CIRCUIT JUDGE.

This is an action to recover possession of the east *half* of lot 7 in the block bounded by L and M and Fourth and Fifth streets in the city of Sacramento. On April 23, 1862 Mary A. Wallace acquired the title to the *locus in quo.*, through sundry mesne-conveyances from John A Sutter the original grantee under a Mexican Grant. Said Mary A. Wallace was born on May 2, 1857. She consequently attained her majority in May 1875—eighteen being the age of majority in California for females. On May 6, 1876, she conveyed to the plaintiff, Le Roy.

On December 23, 1864, the People of the State of California recovered a judgment for the sum \$17.29 taxes for the year 1863, and \$20.26 costs against said Mary A. Wallace, the premises in question, eight lots in block between X, Y, 21st

and 22d streets, and eight lots in block between G, H, 28th and 29th streets. The lots are wholly disconnected, and lie in different parts of the city.

The judgment roll does not show whether the assessments and taxes were levied separately, or as a single tax upon the whole as one lot. The allegations of the complaint, and the judgment are for a single sum in *solido*. A certificate copy of the judgment and order of sale having been issued to the Sheriff, he sold thereunder the whole of said premises in a body to Eli Mayo for \$48.15 on February 6, 1865. On August 7, 1865, there having been no redemption from the sale, the Sheriff executed and delivered to Mayo, the purchaser, a deed of the entire premises so sold, in which deed he states the sale to Mayo for \$48.15, and recites therein, "he being the highest bidder, and that being the largest sum bid for said property at such sale ;" and no where stating any offer to sell any less amount than the whole. The deed is in the form of that adjudged void by the U. S. Supreme Court in *French vs. Edwards* 13, Wal. 506. On August 25, 1865, the purchaser, Mayo, procured from the Court a writ of assistance under said judgment and sale, and by authority of said writ of assistance on the next day, August 26, he was put in possession of the premises now in question by the Sheriff of the county. On August 6, 1866, the People recovered another judgment against the premises now in question and John Doe and Richard Roe being fictitious names for the sum of \$12.05 taxes for the year 1865, and \$19.93 costs. Upon a certified copy of this judgment and order of sale, the Sheriff again sold the premises in question to said Eli Mayo for \$43.02 ; and there having been no redemption, the Sheriff executed a deed to said Mayo in pursuance of the sale, on March 25, 1867, in which it is recited he sold the premises "for the sum of 43.02, that being the amount of said judgment and costs, and the best bid therefor ; and said land so sold being the smallest quantity that any purchaser offered to take and pay said judgment and costs." He does not, however, say, that he offered to sell to the party who would take the smallest part of the land, or any part less than the whole. Said Mayo conveyed to the defendant,

Reeves, on December 17, 1875. The defendant Reeves claims title under those tax sales. He, also, sets up the statute of limitations, claiming that he and his grantor, Mayo, have been in possession claiming adversely under those deeds for a period of more than five years prior to the commencement of his action.

The first tax sale and the Sheriff's deed in pursuance thereof require no discussion ; for it is, already, authoritatively settled by the Supreme Court of the United States in *French vs. Edwards* that they are void upon the face of the deed, (13 Wal. 306). The sale and deed in that case arose in the same county under the same statute, and the deed was in form precisely similar to the one in question. In that case, also, the premises consisted of one continuous tract of land. In this the lots were in three different disconnected blocks, lying remote from each other in different parts of the city. The tax seems to have been levied *in solido*. At all events such was the judgment, and the sale appears to have been of the whole *in solido* as one lot. It may well be doubted whether a valid judgment could be rendered in this form charging the tax properly levied upon one lot, as a lien upon another distant and distinct lot, and enforcing it by a proceeding *in rem* against the latter. There was no personal service of process, so as to authorize a personal judgment against the owner ; and the tax was not assessed against the owner by name. But, however this may be, the deed is void on the grounds fully stated in the case cited. It is insisted by the defendant's counsel, that the point upon the invalidity of the deed on its face cannot be insisted on, because no objection was made to the introduction of the deed in evidence. But the deed being in evidence the question arises as to its effect. The deed is a fact in the case ; but it appears upon its face to be void. Hence it passes nothing to the defendant or his grantor. It might as well be claimed that a piece of blank paper put in evidence passed the title, because no objection was made to its introduction. There is nothing in this point.

Conceding for the purposes of this case, that the second tax levy, judgment, sale, and deed are regular in form upon their

face, another question arises. Immediately upon obtaining his first tax deed, Mayo obtained from the Court in the case a writ of assistance ; and under that writ he was put in possession under his deed. He took possession, and thenceforth continued in possession claiming title under this deed. He was in possession before the tax duplicates for that year were perfected, at the time when the suit for the taxes was commenced, and the judgment obtained, and when the tax sale took place. The tax, it is true, was in form against unknown owners ; and the suit and judgment against fictitious persons and the land, and not against either him, or the real owner by name. But he was enjoying the possession obtained by a writ of assistance under a judicial proceeding against the owner claiming title under his said tax deed ; and the tax, under which the second sale was made, if valid at all, was as valid against his interest, as against the real owner, to whose rights he claimed to have succeeded ; and it was his duty to pay the taxes of that year. It is settled in this State, that a party occupying such a relation to the land cannot omit to pay the taxes duly levied upon it, allow it to go to a sale and purchase in either himself or through another an outstanding title. Such a proceeding is but an indirect mode of paying the taxes, which it is his duty to pay himself, without suit, and the law will not tolerate his acquisition of the title of another in this mode through his own wrong. (*Barrett vs. Amercin*, 36 Cal., 326; *Coppinger vs. Rice*, 33 Cal., 424-5; *Bernal vs. Lynch*, 36 Cal., 146; *Reilay vs. Lancaster*, 39 Cal., 356; *Moss vs. Shear*, 25 Cal., 45.)

The next question came under the statute of limitations. Under section 328 of the Code of Civil Procedure : "If a person entitled to commence an action for the recovery of real property * * * be at the time such title first descends, or accrues * * * within the age of majority * * * the time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action." And this has always been, substantially, the statute, with only changes in the form of expression. At the time of the entry of defendant's grantor, and

of the accruing of the action, Mary A. Wallace was an infant just entering upon the ninth year of her age. She did not attain her majority until May, 1875. The complaint was filed May 15, 1876—a few days more than a year after the disability ceased. The defendant while admitting that the action would not have been barred had the title remained in Mary A. Wallace, and the action been brought by her, insists that this disability is a personal privilege which was only available to herself in person, and that her grantee is not protected. I can perceive no principal upon which such a proposition can be sustained. The bar of the statute is a creature of the statute ; and is just such, and no other, as the statute makes it. An adverse possession for the period prescribed vests a title in the possessor (*Arrington vs. Lescom* and cases there cited 34 Cal., 365.) But until the adverse possession has continued for the full period prescribed the title of the owner is in no way affected. It is as perfect up to the last day as on the first. Under the statute in question the time did not begin to run until Mary A. Wallace attained her majority. She had the absolute dominion of the property—a perfect title—in no way impaired or affected by the statute of limitations at the time she conveyed to plaintiff ; and plaintiff took a clear title. Any other construction would materially offset the rights of Mary A. Wallace, in reality confiscate her property ; for the defendant at that time had been in possession more than five years ; and if she could not sell the land and convey a title, she would be deprived of the benefit of one of the most important elements of property—the *jus disponendi* often the only quality which renders it available, or of any really practicable value. Her title to the land was perfect, and whatever title she had, she could, and did, convey to the plaintiff. He took the land subject only to such rights as the defendant had acquired by virtue of an adverse possession from the time Mary A. Wallace attained her majority. If any authority is needed for so plain a proposition it will be found in the cases of *Ford's Lessees vs. Langee* 4 O. St. R. 466 and *Huhs vs. Bunter* 47 Ill., 401.

There must be a finding and judgment for plaintiff, and it is so ordered.

Supreme Court of the United States.

ABSTRACT OF DECISIONS.

Constitutional Law.

1. PROVISION FORBIDDING SPECIAL LEGISLATION.—The Constitution of the State of Alabama declares that “Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes.” An act of the legislature authorized the Wills Valley Railroad Company (a pre-existing corporation) to purchase the railroad and franchises of the Northeast and Southwestern Alabama Railroad Company (another pre-existing corporation); and, after doing so, to change its own name to that of the Alabama and Chattanooga Railroad Company. *Held*, that there was nothing in this legislation repugnant to the constitutional provision referred to. That provision could not be construed to prohibit the legislature from changing the name of a corporation, or from giving it power to purchase additional property; and this was all that it did in this case. No new corporate powers of franchise were created. Decree of Circuit Court S. D. Alabama, affirmed. *Wallace, appellant, vs. Loomis.* Opinion by Bradley J.

2. PRIORITY AMONG MORTGAGES : ACTS AFFECTING.—A railway company issued mortgage bonds upon its road, payable in lawful money. These bonds were guaranteed by the State, and thereafter the company indorsed upon them a promise to pay them in gold. *Held*, not to affect the priority of the security over a second mortgage on the same property. Ib.

SET-OFF—LEGISLATIVE CONTROL—STATUTE ALLOWING SET-OFF PASSED AFTER JUDGMENT OBTAINED.—1. The extent to which mutual obligations may be set-off against each other, when no right of third parties interfere, is wholly within the power of legislative action. 2. To what extent this right of set-off may be asserted against judgments, and what class of obligations may be so set-off, and the mode of doing it, may be regulated by the legislature. 3. A statute, therefore, as

that of North Carolina, passed, after the bank or its commissioners had obtained a judgment, which authorizes the defendant to set-off against it the circulating notes of the bank procured after the judgment, is, as between the bank or its commissioner and the defendant, valid, and does not impair the obligation of the contract sued on or of the judgment. 4. But if the rights of creditors of the bank, or any one else interested in the judgment, were such that they would have a right to have the judgment paid in lawful money, the case would be different. *Blount vs. Windley*. In error to the Supreme Court of North Carolina. Opinion by Mr. Justice Miller. Judgment affirmed.

INDIAN COUNTRY—LIABILITY FOR ACTS COMMITTED UNDER MISTAKE—MEASURE OF DAMAGES.—1. All the country described by the first section of the act of June 30, 1834, 4 U. S. Stats. 729, as Indian country, remains Indian country so long as the Indians retain their title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress. 2. Whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves in time of peace than civilians for wrongs committed under orders emanating from a source which is itself without authority in the premises. Hence a military officer seizing liquors supposed to be in Indian country when they are not, is liable to an action as a trespasser. 3. The difference between the value of the goods so seized, at the place where they were taken and the place where they were returned to the owners, is the proper measure of damages. *Bates vs. Clark*. In error to the Supreme Court of the Territory of Dakota. Opinion by Mr. Justice Miller. Judgment affirmed.

APPEAL BY PARTY NOT INJURED BY DECREE.—One Strang brought an action in the Federal court to foreclose a mortgage upon a railroad. Subsequently the N. & S. A. R. R. was, upon its own application, made a defendant in the foreclosure suit, it claiming to hold a mortgage prior to that of Strang. Thereafter, one Young, holding a statutory lien upon the same property, commenced an action in the United States Circuit Court to enforce the statutory lien, and Strang, the trustees under the Strang mortgage, and the N. & S. A. R. R. were made parties, and the latter in its answer claimed priority to the other in cum.

brances. Subsequently the Strang suit was transferred to the United States Circuit Court. The suits were heard together, and a decision was made in favor of the N. & S. A. R. R., and subsequently, upon the application of that company, there was a sale ordered and a direction given to first pay the company's claim from the proceeds. From this order the complainants in the two suits appealed. The next day after the appeal was taken the circuit court again considered the cause, and, upon the application of those holding claims adverse to that of the company mentioned, ordered a consolidation of the two suits and directed a sale of the property subject to the lien of the company. From this decree the company prayed an appeal to operate as a *supersedeas*, offering the proper bond. The circuit court refused to grant the appeal or accept a *supersedeas* bond, being of the opinion that the company had no right to appeal or to give bond to supersede the execution of the decree. The S. & N. A. R. R. thereupon petitioned the supreme court for a *mandamus* requiring the circuit court to grant the appeal and accept a good and sufficient *supersedeas* bond. *Held*, that the petition should be granted. The Court said: "This application is resisted upon the general ground that the S. & N. A. R. R. can not appeal, because its rights are not injuriously affected by the decree. That company was a party to each of the suits consolidated for the purposes of the decree. It was, therefore, a party to the suit as consolidated, and entitled to be heard upon the pleadings as they stood before the consolidation, since no change in that particular was ordered or deemed necessary by the court. Among the pleadings in the Strang suit thus brought into the consolidated suit, was the cross-bill of this company praying affirmative relief in the final determination of the cause. It matters not that at a former day in the term a special decree had been rendered upon the subject-matter of the cross-bill, and that an appeal from that decree had been taken, for "a cross-bill is a mere auxiliary suit and a dependency of the original." *Cross vs Duval*, 1 Wall. 14; *Ayres vs Carver*, 17 How. 596. * * * * A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action. 2 Daniel's Ch. 1548. The S. & N. A. R. R. deemed it necessary for the protection of its rights in the mortgaged property, that in any sale which was ordered, provision should be made for the payment of its claim out of the proceeds, insisting for that purpose that its lien was prior in time to that of either of the other mortgage creditors. To accomplish this, a cross-bill was necessary, and it was accordingly filed. The decree upon this bill being under the ruling in *Ayres vs Carver*, *supra*, interlocutory only, was superseded by that of July 6, which finally disposed of the cause in a manner entirely inconsistent with its provisions. It is clear, therefore, that the decree, as rendered, did, in effect, deny the company the relief it asked, and that, if there were nothing more in the case, redress might be had by an appeal." *Ex parte The North and South Alabama Railroad*. Opinion by Mr. Chief Justice Waite.

Application granted.

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Current Topics.

IN *Green vs. Meyer* just decided by our Supreme Court, several important questions were discussed. The principal facts were these : Green was the owner of certain wheat which he desired shipped to Europe for sale, and employed E. E. Morgans' Sons shipping and commission merchants at San Francisco to ship and make sale of same for his (Greens) account. Morgans' Sons took the bill of lading in their own name, and then pledged the said wheat to the defendant Meyer to secure an indebtedness due him by the said Morgans' Sons. Morgans' Sons became insolvent and plaintiff Green demanded the wheat of Meyer but he refused to deliver it, and Green brought this action for conversion of his property. It was claimed by the defendant that the plaintiff was not entitled to the possession of the property ; that he made no tender of freight and charges advanced ; that the court below found that one Baker, the master of the vessel was in the rightful posession of said property and therefore the refusal on his part was properly made and such a finding was conclusive against the plaintiff, etc.

The plaintiff contended that the wrongful act of Morgans' Sons in pledging this property for their debt gave them an immediate right to recover the possession of the property; that Meyer knew that Morgans' Sons were not the owners of said property, that they were only factors; and that he also knew that Morgans' Sons were insolvent at the time the pledge was

given, and that the findings of fact show that Baker was the agent of defendant Meyer.

The case seems to turn upon the fact of notice by Meyer as to the real ownership of property. (See *Green vs. Campbell* in this number.) There seems to have been no question as to his knowledge that Morgans' Sons were only factors.

The court below held Meyer liable and the Supreme Court affirms the judgment.

THE Supreme Court of the United States, in *Kerr vs. Clam-pitt*, declares that it has no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, and that the judgment of such court cannot be examined through its rulings upon that question. That if, when the final judgment is brought here for review by writ of error, no other documents are presented for consideration than such as were before the inferior court upon the application for a new trial, this court cannot look into them, and if error is not otherwise disclosed by the record, the judgment will be affirmed.

That this court must have before it a bill of exceptions, or what is equivalent to such a bill, upon which the final judgment of the court below was reviewed, or it will not examine into any alleged errors except such as are otherwise apparent on the face of the record.

WE publish in full the opinion in the case of *Pennoyer vs. Neff* in the Supreme Court of the United States, a synopsis of which, we gave in our last number.

Whilst the principles announced are not new they are opposed to a theory of one of our statutes under which, in the case of *Hohn vs. Kelly* 32 Cal. it was assumed the court had jurisdiction of the parties; that however was not the main issue in that case.

It remains to be seen what attention our courts will give this declaration.

Supreme Court of California.

[January Term, 1877.]

[No. 5,299.]

[Filed March 14th, 1878.]

GREEN vs. CAMPBELL.

FACTORS.—WHEN THEIR CONTRACTS BIND THE OWNER.—Contracts made by third parties with a factor in respect to the property, without knowledge on the part of said third party that said factor is not the real owner, will be binding upon the owner.

A factor has ostensible authority to deal with the property as his own in transactions with persons not having notice of the real ownership.

Green, the respondent, forwarded from Yolo county certain wheat consigned to E. E. Morgans' Sons, shipping and commission merchants, doing business at San Francisco, to be forwarded to a European port by said Morgans' Sons and there sold by them for account of respondent. The said Morgans' Sons had previously been largely engaged in buying, selling, and shipping wheat to Europe on their own account.

Morgans' sons shipped the aforesaid wheat belonging to Green in their own name, on board of the appellant Campbell's vessel, to be sent to Europe in accordance with the terms of a charter party,

Morgans' Sons became insolvent, and Green claimed delivery of his wheat from Campbell, without making tender of freight and charges.

Campbell filed an amended answer, setting up that the wheat "was shipped by Morgans' Sons merchants and factors as aforesaid, in their own name and the usual course of trade, without knowledge or notice on the part of this defendant, of the alleged ownership thereof, by said plaintiff or of the ownership thereof by any person, or persons, other than said Morgans' Sons".

A demurrer to this amended answer was sustained, and Campbell appealed,

PER CURIAM.

The amended answer of Campbell, to which a demurrer was sustained, set up that the wheat "was shipped by E. E. Morgan's Sons, merchants and factors, as aforesaid, in their own name and in the usual course of trade, without knowledge or notice on the part of this defendant of the alleged ownership thereof by said plaintiff, or of the ownership thereof by any person or persons other than said E. E. Morgan's Sons."

The demurrer should have been overruled, for under the provisions of the Civil Code. (§ 2369.) Morgans' Sons factors of the plaintiff, had *ostensible* authority to deal with the property as their own "in transactions with persons not having notice of the actual ownership."

In this respect the case differs from that of *Green vs. Meyer* just decided.

Judgment reversed and cause remanded for a new trial.

U. S. District Court.

DISTRICT OF CALIFORNIA.

THE CALIFORNIA CRACKER COMPANY vs. THE
SCHOONER SUPERIOR.

A purchaser of a vessel from the owner of record at the Custom House, will be protected as against any prior unrecorded sale, unless it appears that the last sale is colorable and without consideration.

On the 30th day of January, 1877, Matthew Nunan filed a libel against the above vessel to recover \$1687.31 being moneys alleged to have been laid out and expended by him for her benefit.

On the 6th day of February, one Thos. D Young appeared and filed his claim to the vessel. On the 17th day of March, the California Cracker Co. filed a libel to recover the possession

of the vessel and damages for her detention. On the 30th of April this libel was amended.

On the 27th of March, Young filed a claim to the vessel, and on the 11th of April, his answer to the libel of the Cracker Co.

No further proceedings in the Nunan suit have been had; it being understood that the Cracker Co., if it should be adjudged to be the owner of the vessel, will satisfy Nunan's demand.

The only question now before the Court is whether the title and right of property in the vessel is in Thos. D. Young or in the Cracker Company.

Both parties derive their title from Frederick Clay. The dis-
tainer of Young's title is as follows:

November 20th, 1875.

F. Clay to H. Molyneaux.

January 10th, 1876,

H. Molyneaux to S. Q. Clay, wife of F. Clay.

January 29th, 1876,

S. Q. Clay by F. Clay, her Attorney, to Orrington Betts.

January 30th, 1877,

Orrington Betts to Thomas Young.

All of these conveyances were duly recorded in the Custom House as required by law.

The Cracker Company's title is as follows:

In March 1876 the Company commenced a suit in the Fourth District Court of this State, against Frederick Clay to recover the amount of two promissory notes, and attached the vessel as his property.

In December, 1876, the Company recovered judgment, and on the 11th of December, the vessel was sold on execution and bought by the Company to whom the Sheriff executed a bill of sale.

This bill of sale was not recorded until March 8, 1877, some 37 days subsequently to the record of the conveyance to Young.

On the 17th of January, 1877, one Peter Lassen, filed a libel in this Court against the schooner for materials etc; she

was then in possession of the Company under the deed by the Sheriff.

She was seized by the Marshall, and on, the 29th of January was released on a bond given by Orrington Betts, who had appeared as claimant.

On the 38th of January, the libel of Lassen was dismissed, his demand having been paid, and on the same day the bill of sale from Betts to Young was executed and recorded and on the same day, she was again seized on the libel filed by Nunan, and the subsequent proceedings were had which have already been detailed. The above facts are undisputed.

It results, that the legal title to the vessel is in the claimant Young, under a series of conveyances duly executed and recorded, commencing with Clay's, the admitted owner in 1873.

The libel does not clearly disclose the grounds upon which the Cracker Co. base their claim of ownership. It merely avers in substance, that on the 25th of October, 1873, Frederick Clay became the owner of the vessel, and so remained until she was attached, and on the 11th of December, 1876, sold to the libellants, as his property by the Sheriff.

The records of the Custom House disprove these allegations.

It is contended however, that when Clay directed Molyneaux (who, it is admitted, only held the title as security for certain liabilities of Clay) to put the vessel in Mrs. Clay's name, his motive and design was to cover up and conceal the true ownership in fraud of his creditors; that no consideration was paid by Mrs. Clay, and that her husband was the real owner.

It is further contended that the conveyance by Mrs. Clay through her husband as her attorney, to Orrington Betts was in like manner colorable and without consideration, and that Clay remained the real owner. There is some reason to suspect, perhaps to believe that this was the true character of these transactions. It appears however, that when her husband's circumstances became embarrassed, Mrs. Clay placed the whole or a large part of her separate property at his disposal. It may therefore be, that when Clay directed Molyneaux to convey to his wife, he merely intended to reimburse

her in part for the property he had received from her, and to so place the title that the vessel could not be reached by his creditors. The conveyance to Betts may have been in furtherance of the same design. Under the Bankrupt Act this would have perhaps amounted to a preference, if Clay was insolvent and Mrs. Clay was aware of it, but it did not constitute a fraud such as would render the vessel in Mrs. Clay's or Betts' hands, liable to attachment and sale on execution as Clay's property for his debts. But this point it is not necessary to consider.

For the purposes of this case I will assume that the vessel while she remained in Betts' name was in fact the property of Clay, and liable as such to attachment and execution for his debts, and that the sale by the Sheriff passed, as against Betts, the title to the libellants.

By Section 4192 of the R. S. it is provided that "no bill of sale, mortgage hypothecation, or conveyance of any vessel, or part of any vessel, shall be valid against any person other than the grantor or mortgagor his heirs and devisees and *persons having actual notice thereof*, unless such bill of sale, mortgage hypothecation, or conveyance, is recorded in the office of the Collector of the Customs where such vessel is registered or enrolled."

There is no proof whatever that Young had notice, either actual or constructive, of the Sheriff's sale to the libellant. He was aware that there was, or had been some litigation between Betts and the Sheriff in regard to her, for he had at Betts' request signed his replevin bond; But of the suit by the Company against Clay he appears to have been wholly ignorant, as also of the fact that she had been sold to the Company on an execution against Clay. The deed by the Sheriff can have no greater effect than if Clay himself had been the real owner, had conveyed to the Company, and had subsequently conveyed to Young, and the latter had first recorded his deed. Young's title, if bona fide, would in that case prevail by force of the statute, unless he had actual notice of the prior bill of sale. As Young had no notice of the previous sale to the Company, his title can only be defeated by showing that the sale to him was wholly fictitious, that it did

not represent a real transaction, and that the true ownership remained in Clay. Mere knowledge on his part that as between Betts and Clay the latter was the true owner, or that Betts held the title in trust for Clay would not affect his rights unless he was a party to a conspiracy on the part of Betts to defraud his cestui que trust, which is not pretended. Nor if aware that Betts held in trust for Clay, was he bound to inquire why Clay had put the title in his name, whether for convenience, or to secure it for his wife, or to put it beyond the reach of his creditors.

The protection of the statute would be gone, and the transfer of property of this kind greatly embarrassed if the purchaser who buys a vessel for a valuable consideration from the legal owner of record were put on inquiry as to matters of this kind and were bound, at his peril to ascertain the truth.

But in fact there is no evidence to show that Young had any knowledge or suspicion that Clay, or Mrs. Clay were in any way interested in the vessel. His negotiations were conducted exclusively with Betts. He swears that he never spoke with Clay on the subject, and that he had no knowledge that he or any one besides Betts had an interest in or title to the vessel.

No attempt is made to disprove Young's statement, as to the payment by him of the purchase money.

He appears to have paid \$7000 in cash, besides satisfying claims her against to the amount of \$700 or \$800.

He gives the name of the broker in this city upon whom the checks were drawn, and produces the promissory note given for the purchase money, with indorsements showing the dates and amount of the payments made on account.

The advocate for the libellant has, with great diligence and ingenuity, collected various incidents of the sale to Young from which he infers that that transaction was wholly fictitious, and that Young was fully aware that Clay was the real owner.

But I can discover nothing in the circumstances referred to, to justify the rejection of Young's positive statement that the transaction was a real purchase, and that he in good faith paid his money for the vessel in total ignorance of any title to her on

the part of Clay, or of any sale of such title by the Sheriff. Young must therefore be regarded as a bona fide purchaser for value, without notice, and as such, must be protected, even though, as between Betts, and Clay, the real ownership was in the latter.

Decree for Claimant.

Recent Decisions.

United States Supreme Court.

[October term, 1877.]

SYLVESTER PENNOYER, Plaintiff in Error, vs. MARCUS NEFF.

In Error to the Circuit Court of the United States for the District of Oregon.

1. Defects in an affidavit for an order of publication can only be taken advantage of on appeal or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally; and proof of publication is sufficient when the affidavit is made by the editor of a paper.
2. A personal judgment rendered in a State Court in an action upon a money demand against a non-resident of the State, without personal service of process upon him within the State, or his appearance in the action, upon service by publication, is without any validity; and no title to property passes by a sale under an execution issued upon such a judgment.
3. If non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate.
4. Substituted service by publication, or in any other authorized form, is sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the Court by seizure or some equivalent act. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose.
5. Process from the tribunals of one State cannot run into another and summon parties there domiciled to leave its territory and respond to proceedings against them; and publication of process or notice within the State in which the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability.
6. Whilst the Courts of the United States are not foreign tribunals in their relations to the State Courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State Courts only the same faith and credit which the Courts of another State are bound to give to them.
7. The term "due process of law," when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitu-

tion to pass upon the subject-matter of the suit, and if that involves merely determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Mr Justice FIELD delivered the opinion of the court.

This is an action to recover the possession of a tract of land, of the alleged value of \$15,000, situated in the State of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of September 27th, 1850, usually known as the donation law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the State. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than \$300, including cost, in an action brought by him upon a demand for services as an attorney; that at the time the action was commenced, and the judgment rendered, the defendant therein, the plaintiff herein was a non resident of the State; that he was not personally served with process, and did not appear therein, and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The code of Oregon provides for such service when an action is brought against a non-resident and absent defendant, who has property within the State. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein, and in the last case only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean that in an action for money or damages where a defendant does not appear in the court, and is not found within the state, and is not a resident thereof, but has property therein the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power and resisted as mere abuse.* In the case against the plaintiff the property here in controversy sold under the judgment rendered, was not attached or in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore disposed of pursuant to any adjudication, but only in enforcement of a personal judgment having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to validity of the sale, but held that the

* D'Arcy vs. Ketchum, et al., 11 How., 174.

judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute only requires, for an order of publication, that certain facts shall appear by affidavit *to the satisfaction of the court or judge*, defects in such affidavit can only be taken advantage of on appeal or some other direct proceeding, and cannot be urged to impeach the judgment collaterally. The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the "affidavit of the printer or his foreman or his principal clerk," is satisfied when the affidavit is made by the editor of the paper. The term printer, in their judgment, is there used not to indicate the person who sets up the type; he does not usually have a foreman or clerks; it is rather used as synonymous with publisher. The Supreme Court of New York so held in one case, observing that, for the purpose of making the required proof, publishers were "within the spirit of the statute."^{*} And following this ruling the Supreme Court of California held that an affidavit made by a "publisher and proprietor" was sufficient.[†] The term editor, as used when the statute of New York was passed, from which the Oregon law is borrowed, usually included not only the person who wrote or selected the articles for publication, but the person who published the paper and put it into circulation. Webster, in an early edition of his dictionary, gives as one of the definitions of an editor, a person "who superintends the publication of a newspaper." It is principally since that time that the business of an editor has been separated from that of a publisher and printer, and has become an independent profession.

If, therefore we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted upon here, that the judgment in the state court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand of a resident creditor except by a proceeding *in rem*; that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the circuit court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent state over persons and property. The several states of the Union are not, it is true, in every respect independent; many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But except as restrained and limited by that instrument they possess and exercise the authority of independent states, and the principles of public law, to which we have referred, are applicable to them.

^{*} *Bunce vs. Reed*, 16 Barbour, 350.

[†] *Sharp vs. Daughney*, 33 Cal., 512.

One of these principles is that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil status and capacities of its inhabitants ; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced ; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned, that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory.* The several states are of equal dignity and authority, and independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity ; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity and incapable of binding such persons or property in any other tribunals."†

But as contracts made in one state may be enforceable only in another state, and property may be held by non-residents, the exercise of the jurisdiction which every state as admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a state affecting persons resident or property situated elsewhere, no objection can be justly taken, whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operations to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the state in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with, and the exercise of this jurisdiction in no manner with the supreme control over the property by the state within which it is situated.‡ So the state, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demands of its own citizens against them, and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens, and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can enquire into that non-resident's obliga-

* Story on Conflict of Laws, Chapter 2, and Wheaton on International Law, Part 2, Chapter 2.

† Conflict of Laws, Section 539.

‡ Penn vs. Lord Baltimore, 1 Vesey, 444 ; Massie vs. Watts, 6 Cranch, 148 ; Watkins vs. Holman, 16 Peters, 26 ; Nutt vs. Corbett, 10 Wallace, 475.

tions to its own citizens, and the enquiry can then only be carried to the extent necessary to control the disposition of the property. If the non-residents have no property in the state, there is nothing upon which the tribunals can adjudicate.

These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus, in *Picquet vs. Swan*, * Mr. Justice Storey said: "Where a party is within a territory, he may justly be subjected to its process and bound personally by the judgment pronounced on such process against him. Where he is not within such territory and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*."

And in *Boswell's Lessee vs. Otis*, † where the title of the plaintiff in ejectment was acquired on a Sheriff's sale, under a money decree rendered upon publication of notice against non-residents, in a suit brought to enforce a contract relating to land, Mr. Justice McLean said: "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or secondly, by a procedure against the property of the defendant within the jurisdiction of the Court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*."

These citations are not made as authoritative expositions of the law, for the language was perhaps not essential to the decision of the cases in which it was used, but as expressions of the opinion of eminent jurists. But in *Cooper vs. Reynolds*, reported in the 10th of Wallace, it was essential to the disposition of the case to declare the effect of a personal action against an absent party, without the jurisdiction of the Court, not served with process or voluntarily submitting to the tribunal, when it was sought to subject his property to the payment of a demand of a resident complainant; and in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions and the jurisdiction of the Court over them. In that case the action was for damages for alleged false imprisonment of the plaintiff, and upon his affidavit that the defendants had fled from the State or had absconded or concealed themselves so that the ordinary process of law could not reach them, a writ of attachment was sued out against their property. Publication was ordered by the Court, giving notice to them to appear and plead, answer or demur, or that the action would be taken as confessed and proceeded in ex parte as to them. Publication was had but they made default and judgment was entered against them, and the attached property was sold under it. The purchaser having

* 5 Mason, 43.

† 9 Howard, 348.

been put into possession of the property, the original owner brought ejectment for its recovery. In considering the character of the proceeding, the Court, speaking through Mr. Justice Miller, said : " Its essential purpose or nature is to establish, by the judgment of the Court, a demand or claim against the defendant, and subject his property lying within the territorial jurisdiction of the Court, to the payment of that demand. But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within the territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the Court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the Court may proceed in the case, whether he appears or not. If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the Court, to answer any demand which may be established against the defendant by the final action of the Court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the Court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions : first, the judgment of the Court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other ; nor can it be used as evidence in any other proceeding not affecting the attached property ; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the Court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the Court of further jurisdiction, though the publication may have been duly made and proven in Court."

The fact that the defendants in that case had fled from the State, or had concealed themselves, so as not to be reached by the ordinary process of the Court, and were not non-residents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the Court, and the grounds and extent of its authority over persons and property thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance.

The writer of the present opinion considered that some of the objections to the preliminary proceedings in the attachment suit were well taken, and therefore dissented from the judgment of the Court ; but to the doctrine declared in the above citation he agreed, and he may add that it received the approval of all the judges. It is the only doctrine consistent with proper protection to citizens of other States. If without personal service judgments *in personam* obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by

the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the Court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent, and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the Court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam* constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a State to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below, but the position is assumed that where they have property within the State it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement that the jurisdiction of the court to enquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid, if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defend-

ant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. In *Webster vs. Reid*, reported in 11th of Howard, the plaintiff claimed title to land sold under judgments recovered in suits brought in a territorial court of Iowa, upon publication of notice under a law of the territory, without service of process, and the court said: "These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments therefore, are nullities, and did not authorize the executions on which the land was sold."

The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several States, as attempts have been made to enforce such judgments in States other than those in which they were rendered, under the provision of the Constitution requiring that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State;" and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that when thus authenticated, "they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are or shall be taken." In the earlier cases it was supposed that the act gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an enquiry into the jurisdiction of the court in which the judgment was rendered or the right of the State itself to exercise authority over the person or the subject-matter.* In the case of *D'Arcy vs. Ketchum*, reported in the 11th of Howard, this view is stated with great clearness. That was an action in the Circuit Court of the United States for Louisiana, brought upon a judgment rendered in New York under a State statute, against two joint debtors, one of whom only had been served with process, the other being a non-resident of the State. The circuit court held the judgment conclusive and binding upon the non-resident not served with process; but this court reversed its decision, observing that it was a familiar rule that countries foreign to our own disregarded a judgment merely against the person, where the defendant had not been served with process nor had a day in court; that national comity was never

**M'Elmoine vs Cohen*, 13 Peters, 212.

thus extended ; that the proceeding was deemed an illegitimate assumption of power and resisted as mere abuse ; that no faith and credit, or force and effect, had been given to such judgments by any State of the Union, so far as known, and that the State courts had uniformly and in many instances held them to be void. "The international law," said the court, "as it existed among the States in 1790, was that a judgment rendered in one State assuming to bind the person of a citizen of another, was void within the foreign State when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction nor that of courts of justice had binding force." And the court held that the act of Congress did not intend to declare a new rule or to embrace judicial records of this description. As was stated in a subsequent case, the doctrine of this court is that the act "was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result ; nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another."*

This whole subject has been very fully and learnedly considered in the recent case of *Thompson vs. Whitman*,† where all the authorities are carefully reviewed and distinguished, and the conclusion above stated is not only reaffirmed, but the doctrine is asserted that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence. In all the cases brought in the State and federal courts, where attempts have been made under the act of Congress to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception so far as we are aware, that such judgments were without any binding force, except as to property or interests in property within the State, to reach and effect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained and the party did not voluntarily appear, as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can only enquire into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits.

In *Bissell vs. Briggs*, decided by the Supreme Court of Massachusetts as early as 1813, the law is stated substantially in conformity with these views.

In that case the court considered at length the effect of the constitutional provision and the act of Congress mentioned, and after stating that in order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the Constitution, the court must have had

**The Lafayette Insurance Company vs. French*, 15 Howard, 406.
†18 Wall., 457.

jurisdiction, not only of the cause, but of the parties. It proceeded to illustrate its position by observing that where a debtor living in one State has goods, effects, and credits in another, his creditor living in the other State may have the property attached pursuant to its laws, and on recovering judgment have the property applied to its satisfaction, and that the party in whose hands the property was would be protected by the judgment in the State of the debtor against a suit for it, because the court rendering the judgment had jurisdiction to that extent; but that if the property attached were insufficient to satisfy the judgment, and the creditor should sue on that judgment in the State of the debtor, he would fail, because the defendant was not amenable to the court rendering the judgment. In other words, it was held that over the property within the State the court had jurisdiction by the attachment, but had none over his person, and that any determination of his liability, except so far as was necessary or the disposition of the property, was invalid.

In *Kilbourn vs. Woodworth** an action of debt was brought in New York upon a personal judgment recovered in Massachusetts. The defendant in that judgment was not served with process and the suit was commenced by the attachment of a bedstead belonging to the defendant, accompanied with a summons to appear served on his wife after she had left her place in Massachusetts. The court held that the attachment only bound the property attached as a proceeding *in rem*, and that it could not bind the defendant, observing that to bind a defendant personally when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice, repeating the language in that respect of Chief Justice DeGrey, used in the case of *Fisher vs. Lane*, in 1772.† To the same purport decisions are found in all the State courts. In several of the cases the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding. But if the Court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding without service upon him or his appearance is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice, it is difficult to see how the judgment can legitimately have any force within the State. The language used can be justifiable only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered, and that, therefore, it could only be called in question when its enforcement was elsewhere attempted. In latter cases this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice and as an absolute nullity because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered.‡

*5 Johnson, 37.

†3d Wilson, 292. See, also *Borden vs. Fitch*, 15 Johnson, 142, and the cases there cited, and *Harris vs. Hardeman et al.*, 14 How., 839-843.

‡*Smith vs. McCutchen*, 38 Missouri, 415; *Darrance vs. Preston*, 18 Iowa, 397; *Hanks vs. Shupe*, 27 Id., 475; *Mitchell's Administrator vs. Gray*, 18 Indiana, 123.

Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.

Since the adoption of the Fourteenth Amendment to the Federal Constitution the validity of such judgments may be directly questioned and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties, over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit, and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process allowed by the law of Oregon, and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his Treatise on Constitutional Limitations, for any other purpose than to subject the property of a non-resident to valid claims against him in the State, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered." P 405.

It is true that in a strict sense a proceeding *in rem* is one taken against property, and has for its object the disposition of the property, without reference to the title of individual claimants, but in a larger and more general sense, the terms are applied to actions between parties, where the object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtor, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned.

It is hardly necessary to observe that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, not to

proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the State creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action.*

It follows from the views expressed that the personal judgment recovered in the State Court of Oregon, against the plaintiff herein, then a non-resident in the State, was without any validity and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants, involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The statute, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process, or personal notice to the offending party, the injured citizen would be without redress.†

Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service may be made and notice given, and provide upon their failure to make such appointment or to designate such place, that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in *Vallee vs. Dumergue*: ‡ "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings, should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them." § Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. ||

In the present case there is no feature of this kind, and consequently no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident, can arise. The question here respects the validity of a money judgment rendered in one State, in an action upon a simple contract, against the resident of another, without service of process upon him, or his appearance therein.

Judgment affirmed.

**Nations et al. vs. Johnson et al.*, 24 Howard, 203-205.

†*Bishop on Marriage and Divorce*, Sec. 156.

‡*Exchequer*, 290.

§See also *Lafayette Insurance Company vs. French*, 18 How., 407, and *Gillespie vs. Commercial Insurance Company*, 12 Gray, 201.

||*Copin vs. Adamson*, Law Rep., 9 Ex., 345.

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Current Topics.

THE Governor on March 21st signed bills to amend section 415 of the Penal Code, relating to riotous conduct in public assemblages; and to provide for the appointment by the Governor of a Reporter of the Decisions of the Supreme Court.

SENATOR PIERSON introduced a bill modifying Judicial Districts in San Francisco. The bill makes the court-room of the New City Hall portions of each Judicial District of San Francisco. The rules were suspended and the bill passed.

THE Supreme Court, in a recent case in New York, decided a somewhat new question in foreclosure. It appears that Thomas Murphy, ex-Collector of the Port, on the 13th of February, 1872, gave a mortgage for \$2,940, payable in five years, upon property for the purchase money. On the 20th of the following August Mr. Murphy conveyed these premises to ex-Judge Wm. Fullerton, the latter assuming the mortgage. Wm. Devlin, assignee of the mortgage, brought suit April 21st, 1877, to foreclose it, claiming judgment against Mr. Fullerton for any deficiency there might be upon the foreclosure sale. Mr. Fullerton, by deed, dated April 5th, 1877, acknowledged and delivered on June 16th following, two months after the foreclosure was begun, reconveyed these with other premises to Mr. Murphy, who had meantime become insolvent, the latter assuming and agreeing to pay the mortgages and releasing and discharging Mr. Fullerton. On the trial in the Supreme Court Special term, before Judge Van Vorst, Mr. Fullerton,

who alone defended, testified that it was part of the terms and conditions upon which he became purchaser of the lands covered by the mortgage, with others, that his grantor, Murphy, would at any time thereafter accept a reconveyance of the lands, and reimburse him for what he had paid out, and reinstate him as he was at first. In the event of a reconveyance he was to get back principal and interest on all he should pay as consideration, and all disbursements, including the taxes and assessments, and he was to be released from all obligations he should assume. Mr. Murphy, who was called as a witness on the other side, corroborated Mr. Fullerton, at least to the extent that he would take back the premises whenever Mr. Fullerton got tired of it. Judge Van Vorst, in his decision, holds that the reconveyance by Murphy released Fullerton from any obligation in respect to the mortgage. The agreement between Murphy and Fullerton, though verbal, being contemporaneous with the deed, and in part performed at the time, by the making and acceptance of the original conveyance, and the reconveyance being made and received in further performance of it, was not invalid, so far as third parties were concerned. The question of the validity of the agreement, and whether or not it should be carried out, rested with Fullerton and Murphy exclusively. Whether it was void for indefiniteness as to time or because not reduced to writing, was for the determination of Murphy. He only could object that a delay of five years in making the reconveyance was unreasonable, and it was not for others who were neither parties nor privies to the agreement to complain. Judgment was, therefore, given relieving defendant from liability.

IN two cases—*Davis vs. Russell* and *Hagar vs. Spect*—in the Supreme Court of this State—opinions have just been filed. In *Davis vs. Russell*, Davis, the owner of a lot of wheat, deposited it in the warehouse of Russell, and took a warehouse receipt in usual form, then indorsed the same in blank and delivered it to Barney. Barney transferred it to the Bank of Stockton, who transferred it to one not a party to this action, and Russell afterward delivered the

wheat to holder of receipt. Davis claims not to have *sold* the wheat with the transfer of the receipt and demands its return, and the Court below sustains the demand. This is reversed, and held that Barney's transfer of the receipt to the bank was for a valuable consideration, and hence the holders of the receipt were not liable to plaintiff for return of wheat or value: —in other words, that the warehouse receipt was a negotiable instrument and regarded as on the same footing with a bill of lading. *Harr vs. Baker*, 8 Cal., 613.

In *Hagar vs. Spect*, the Court discusses the doctrine of estoppel *in pais* and construction of deeds. Both opinions will appear in full in our next issue.

THE Constitutional Convention is now a fixed fact. The Senate and the Assembly both adopted the report of the Joint Committee. In the Senate the report was agreed to without debate. In the Assembly there was considerable discussion. The changes made in the bill on the recommendation of the Joint Committee are that the Convention meets on Saturday, the 28th of September, instead of the third Monday in September, and of the delegates at large from the four Congressional districts, the eight having a plurality in each Congressional district are to be declared elected. This was done to insure that of the 32 delegates at large eight should represent each of the Senatorial districts. Otherwise if the plurality were confined to the whole State, it might happen that more than eight residing in one Congressional district might receive the largest number of votes, because the people vote for the whole 32 of the delegates at large. This proposition gave rise to considerable debate in the Assembly, Hugg protesting against it. He, however, was somewhat mollified by the fact that the Convention was to be the judge of the qualifications of its own members, and he thought the Convention would right any wrong that might occur from this provision. The bill as it now stands provides for the election of 152 delegates, 110 by the respective Senatorial districts, and 32 at large; the delegates to receive a per diem of \$10 for 100 days and mileage such as is allowed members of the legislature; the election for delegates

will take place in June ; the Convention meets September 28th, and the Constitution will be submitted for ratification or rejection by the people in May of next year.

ASSEMBLYMAN SWIFT has introduced, by request, a bill to amend sections 276 and 281 of the Code of Civil Procedure with respect to attorneys and counsellors at law. Section 276 is amended so as to read : " Every applicant for admission as an attorney or counsellor must produce satisfactory testimonials of good moral character, and undergo a strict examination in open Court as to his qualifications by the Justices of the Supreme Court."

Section 280 is amended so as to read : " The Clerk of the Supreme Court shall keep a roll of attorneys and counsellors admitted to practice, which roll must be signed by the person admitted before he receive his license."

Section 281 is amended to read : " If any person shall practice law in any court without having received a license as attorney and counsellor from the Supreme Court of the State, he is guilty of contempt of court, and shall not maintain an action for the recovery of any compensation for such services, and any party paying such person any compensation for such services may maintain an action and recover a judgment against such person in three times the amount of any sum thus paid." The act is to take effect from and after its ~~passage~~. Referred to the Judiciary Committee.

Swift also introduced a bill (by request) adding a new section to the Penal Code to read as follows :

" Section 1,178. Every person who in any manner advertises himself as an attorney and counsellor at law without first having a license as such attorney and counsellor from the Supreme Court of the State is guilty of a misdemeanor."

The act to take effect from and after its passage.

Senator Haymond also yesterday introduced a bill concerning the admission of attorneys. This is the re-introduction of a bill which was introduced in the Assembly earlier in the session and defeated, providing for written examinations of applicants for admission as attorneys.

Supreme Court of California.

[January Term, 1877.]

[No. 4514.]

[Filed March 29, 1878.]

BIHLER vs. PLATT.

TENANTS IN COMMON—PATENTS—PRACTICE AND PLEADING. — The plaintiff brought this suit to quiet title, and derived title from Meyer & Bennitz ; and defendant from Hendy & Glein. Prior to the deeds to plaintiff and defendant the title to the land in controversy had been confirmed and patented to Meyer, Bennitz, Hendy, Glein and Duncan. Plaintiff also claimed through one Rufus who had a Mexican grant, and alleged in his complaint that he was the owner in fee simple, absolute, and had been in actual possession for more than fifteen years. *Held*, that he was only a tenant in common with the defendant, and that if any equities existed in his favor growing out of the deed of Rufus, they must be determined in some action with appropriate pleadings and all necessary parties. (Duncan was not a party to this action.)

PER CURIAM.

The action was commenced before the Codes took effect, and its object is to quiet the plaintiff's title to a parcel of land included in the "Rancho de Herman," which was granted by the Mexican Government to one Rufus, and the title to which has been finally confirmed and patented to Meyer, Bennitz, Hendy, Glein and Duncan, as the successors in interest of Rufus. The petition for confirmation was filed in 1852, in the names of Meyer, Bennitz, Hendy, Glein and Duncan, to whom the patent subsequently issued and the plaintiff derives his title under Meyer and Bennitz, and the defendant Platt under Glein and Hendy, all subsequently to the filing of the petition for confirmation. The complaint avers that at the time of the commencement of the action, the plaintiff was the owner in fee simple absolute, and in the quiet and peaceable possession of the land described in the complaint, and that he and his grantors had been in the actual quiet, adverse and peaceable

possession, claiming title under deeds purporting to convey the land to the plaintiff and his grantors, for more than fifteen years last past. At the trial, the plaintiff derived his title through—first, a deed from Rufus (the original grantee) to Hugal, made in the year 1847, purporting to convey a specific parcel of land by metes and bounds, which, it is claimed, include the premises in controversy; second, a deed from Hugal to Meyer and Bennitz, made in the year 1849, purporting to convey the same premises; third, a deed for the same premises from Meyer and Bennitz to the plaintiff and one Wagner, made in the year 1855, and a subsequent deed from Wagner to the plaintiff: fourth, a patent from the United States, issued in the year 1872, to Meyer, Bennitz, Glein, Hendy and Duncan, under the decree of confirmation for the Rancho de Herman. In his defense the defendant Platt put in evidence: 1st, the two deeds made from Rufus to Glein, made in the year 1847, purporting to convey by metes and bounds two specific parcels of land included in the Rancho de Herman; 2d, a deed from Glein to Adams, made in 1869, purporting to convey the same lands; 3d, a subsequent deed from Adams to Platt for the same lands; 4th, a deed from Hendy to Platt, made in the year 1869, conveying all the right title and interest of former in and to the Rancho de Herman; 5th, a deed made in the year 1869, from Glein to Adams, conveying all the right, title and interest of the former in and to the Rancho de Herman, and a subsequent deed from Adams to Platt conveying the same interest.

So far as appears from the record before us, the decree of confirmation was to Meyer, Bennitz, Glein, Hendy and Duncan as tenants in common, each for an equal undivided interest; and in this respect the patent follows the decree. It purports on its face to convey the title to the five patentees as tenants in common, and there is nothing in the record to indicate that either the decree of confirmation or the patent in any manner recognizes the five patentees as holding in severalty, or otherwise, than as tenants in common. It is clear, therefore, that the legal title conveyed by the patent vested in the five patentees as tenants in common, or in their grantees, hold-

ing either under conveyances made after the filing of the petition for confirmation, or if made before that time, containing such covenants as would convey the after-acquired title by way of estoppel. (*Schults vs. Giovanari*, 43 Cal. 617.) The plaintiff's title is derived from Meyer and Bennitz, two of the patentees, under a conveyance made after the petition for confirmation was filed, and the title of the defendant, Platt, is derived from Glein and Hendy, also two of the patentees under the same circumstances. The legal title, therefore, passed by the patent to the plaintiff, to the defendant and to Duncan, (who is not a party to the action) as tenants in common. If the plaintiff is entitled to any equities founded on the deed from Rufus to Hugal, which should control the legal title, conveyed by the patent, his complaint is not so framed as to entitle him to relief on that ground. No facts are alleged in the complaint as the basis for equitable relief, founded on that conveyance. On the contrary, the complaint alleges that the plaintiff "is the owner in fee simple absolute" of the premises in controversy—a fact which was disproved by the production of the patent, by which it was established, in connection with the conveyances to the plaintiff and the defendant Platt, that he and the plaintiff, together with one Duncan, are tenants in common of said premises. If the plaintiff were to obtain a decree in this action, founded on his alleged equities arising from the deed from Rufus to Hugal, quieting his title to the particular tract in controversy, as against the defendant Platt, the result would be that the plaintiff would continue to be a tenant in common with Platt and Duncan as to the remainder of the tract, while holding in severalty as against Platt, but not as against Duncan (who is not a party to the action) the particular tract now in controversy. We are of the opinion that whatever equities, if any, the several parties may have, founded on the conveyances made by Rufus, must be determined in an action with appropriate pleadings, in which all the necessary parties are before the court.

Judgment and order reversed and cause remanded.

Supreme Court of Illinois.

[Filed February 7th, 1878.]

1. **LIBEL—GENERAL ISSUE—EVIDENCE.**—In an action for libel, where the defendant pleads the general issue and does not justify, evidence tending to prove the truth of the charge or of circumstances which, in the popular mind, tend to cast suspicion upon the plaintiff is inadmissible. But where defendant offered evidence showing that the plaintiff was an estimable young woman, and that two letters purporting to have been written by two respectable citizens of the town where she lived were received through the post-office by defendant, which letters were forgeries, and thereby he was imposed upon and induced to print the charges therein contained; that no one had ever heard of the charges until then, but on the contrary they excited universal indignation, which the trial Court rejected: *Held*, error, as the proof offered did not fall within the above rule. Craig, Scott and Sheldon, J. J., dissenting.
2. **LIBEL—DAMAGES—WEALTH AND STANDING OF DEFENDANT.**—An instruction that in fixing the amount of damages to be awarded as compensation to plaintiff for the injury she has sustained, "the wealth and standing of defendant might properly be considered," is improper. Per Breese, J.
3. "THERE IS A CLEAR DISTINCTION between a publication of a slanderous matter in a newspaper as matter of news, and the publication of slanderous matter upon the personal truthfulness and responsibility of the defendant." Per Breese, J.

BREESE, J., delivered the opinion of the Court:

In the case of *Regnier vs. Cabot*, 2 Gilm, 38, this Court, apparently with great care, laid down, as a rule of law, in actions of this kind, "that where a defendant does not justify he may mitigate damages in two ways only—first, by showing the general bad character of the plaintiff; and, second, by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge." Before that time it had been a question whether, under the general issue, the defendant could be permitted to show specific facts, which tend to cast suspicion of guilt upon the plaintiff, upon which (it is there said), there had been a conflict of authority. The authorities in other States and in England were, in that case, examined, and the rule with its qualifications was laid down, as stated above. In an earlier case, *Young vs. Bennett*, 4 Scam., 46, it had been decided, where defendant had pleaded the

general issue to the whole declaration, and justified as to part of the counts, that it is not competent to prove in mitigation of damages "that a particular rumor prevailed in the neighborhood that plaintiff was guilty of the charge." In *Sheohan vs. Collins*, 20 Ill., 328, the rule laid down in Cabot's case, *supra*, was again laid down and applied. That action was for libel, and it was then held incompetent to show that the libelous article had appeared in another newspaper in the city shortly before its publication by the defendants. The qualification to the proposition that defendant, in such case, "may prove any circumstances which tend to rebut malice," is that if such circumstances tend to prove the truth of the charges expressed in the slander or libel, the proof must be rejected. This qualification excludes not only such circumstances as the law recognizes as competent evidence tending to prove the truth of the charge, but all circumstances which, in the popular mind, tend to cast suspicion of guilt upon the plaintiff.

There can be no question that the proof offered in the case at bar and hereinafter mentioned, tends to rebut the inference of actual malice in the defendant. The turpitude of the publication of matter believed to be true is plainly of a character much less malignant than that of the publication of the same matter well known to be false, and less than the publication of the same matter without *any* reason to suppose it to be true. The proof offered plainly did tend, in some degree, to rebut malice. It tended to reduce the offense of defendant from that of vindictive, virulent malice, or that of utter recklessness, to that of want of proper care in ascertaining the truth before publication. It was, therefore, competent, unless it be excluded by the qualification to the rule.

The question in this case is, did the proof so offered tend to cast suspicion of guilt upon the plaintiff? If so, it was properly rejected by the Circuit Court; if not, it ought to have been admitted. The substance of what defendant offered to show to the jury was, that plaintiff was a worthy and estimable young woman, living in Rockford, Illinois, and that two letters purporting to be written by two respectable citizens of Rockford were forged by some unknown person and sent through

the post-office to the defendant in Chicago, and that defendant was thereby imposed upon and induced to publish the libelous article at the time, supposing the charges to be true, and that no one in Rockford had ever heard a suspicion of the purity of plaintiff until the publication of defendant, and that the publication excited universal indignation. Does this statement tend in the slightest degree to excite in the minds of the jury, the bystanders or the public a suspicion of the probability of guilt on the part of the plaintiff—we think not. On the contrary, it furnishes a vindication of her purity more complete than could any verdict of a jury—saying merely, “she was innocent and the publication malicious.” The proof here offered differs from the case of an attempt to prove that rumors in support of the charge were in circulation before the publication, and from the case where it was proposed merely to prove that a like charge had been published in another journal. Proof that prior rumors existed, or that a prior publication of a charge had been made in another journal, would tend to excite in the minds of the jury a suspicion against the purity of plaintiff, and would tend to cast additional reproach upon the plaintiff. That would be simply a repetition of the slander with no accompanying antidote to neutralize the virus. In fact a statement by a defendant that rumors were prevalent against the chastity of a woman, or that an article charging impurity upon her had been published in a public journal, would constitute of itself ground for another action. Not so with the statement offered to be proved in this case. The publication of the statement offered in proof could not be made the subject of action by the plaintiff, for it in no way suggests to the mind a suspicion of impurity in her. In many cases the application or this rule of exclusion may be difficult. It may not be easy at all times to distinguish between that which is free from the suggestion of guilt in plaintiff and that which is not. The propriety of this exclusion of some matters, though they may seem to rebut malice, seems to rest upon the idea, that while the law will allow a guilty defendant to mitigate, if he can, the degree of his guilt, this is a privilege which must not be exercised, if to do so involves the necessity of casting

reproach upon an innocent plaintiff who has done no wrong. The proof on this point offered in this case, taken as a whole, tended in no degree to cast additional reproach upon the plaintiff, and ought to have been admitted.

The sixth instruction for plaintiff was improperly given—it in substance says to the jury that in fixing the amount of damages to be awarded as *compensation* to the plaintiff for the injury she has sustained, "the wealth and standing of the defendant" might properly be considered. It is not perceived how the injury actually done to the plaintiff by the publication of this libel could be affected either by the wealth or standing of Wilbur F. Storey. This is not a slander uttered personally by the defendant, nor is the libelous matter contained in any communication having the sanction of his name. The extent of the circulation of the newspaper of defendant, and the character and standing of that newspaper for fairness, justice and truth might well be considered upon that question. The wealth of the publisher might be great and his social standing high, and yet the paper might be of such character as to exert but little influence upon the public mind. On the other hand the publisher might be insolvent, and his position in society very low, and yet the paper might be very attractive and have a very large circulation and enjoy the confidence of the public to such a degree for justice and truth, that statements in its columns might carry great weight. There is a clear distinction between a publication of slanderous matter in a newspaper as a matter of news, and the publication of slanderous matter upon the personal truthfulness and responsibility of the defendant. Again, the injury actually suffered in no sense is to be measured by the wealth of the defendant. It must be observed that this instruction does not relate to *vindictive* or *punitive* damages, but solely to compensatory damages. For the errors stated the judgment must be reversed and the cause remanded.

Reversed and remanded. Craig, J., dissenting. Walker, J.

I concur in this opinion, so far as it holds that the forged letters should have been admitted in evidence in mitigation of

damages, but not as to what is said in regard to the instruction. Scott, J., dissenting.

The libel published in defendant's newspaper was a great wrong to the character of plaintiff. Its publication cannot be justified or palliated for any reason or for any cause. It was not legitimate news fit for publication, and if defendant wished to permit the scandalous matter to appear in the columns of his paper, he ought in justice to the parties accused, to have first ascertained whether it was true or false, which he could have done in a few hours by the use of the telegraph. Not to do so shows a reckless disregard of the rights and feelings of innocent parties that might be affected by the publication of such defamatory matter. That part of the opinion by Mr. Justice Breese, which condemns an instruction given for plaintiff, is not concurred in by any four members of the court, and hence the views expressed have no sanction from the court. The only cause for reversing the judgment, which has the sanction of a majority of the court, is that the court below erred in excluding from the jury certain letters received, which, it is said, contain the substance of the libellous publication. The fact that such letters were received was proven, and that the article published was based on them was also proven, and that was all defendant was entitled to prove in that connection. No other legitimate use could be made of the letters, and, indeed, the rulings of the court in that respect were quite favorable to defendant. It must be conceded that, under the former decisions of this court, if the signatures to the letters were genuine, or there had been no signature at all to them, such letters would not have been admissible in evidence. If they would tend to prove anything, it would be the truth of the libel, and that is not allowable under the plea of not guilty. How the fact that the signatures to the letters may be forgeries can change the rule of law on this subject, is to me inexplicable. The introduction and reading of such letters had the court permitted it, to the jury, in the presence of the court, would have been simply a repetition of the libel. Conceding the signatures to the letters were forgeries, the contents were nevertheless libellous and defamatory in the highest degree. Believing there is no error in the record, the judgment ought to be affirmed.

Sheldon. J., concurring with Scott, J.

Notes of Unwritten Opinions.

IN *Gottschalk vs. Kester*, just decided by our Supreme Court, the material facts are these: The plaintiff brought suit in ejectment for certain premises of defendant bought by plaintiff at a constable's sale, upon an execution and attachment in an action by Frank & Dallemand against defendant. The defendant claimed the premises as his *homestead*, his declaration of homestead having been filed and recorded in October 26, 1875. On October 27th Frank & Dallemand commenced action in Justice Court for debt, and levied on the premises of defendant. The point upon which the decision turned was that of *actual residence* at time of filing the declaration. The facts shown were that the defendant, Kester, removed the most of his family and household goods from his said premises on December 1st, 1874, to the "Spring Valley House," about a mile away, which he had leased for one year, but leaving a minor son and some goods upon the premises, which he still cultivated. This lease was cancelled on October 12th, 1875. His family still remained at the "Spring Valley House" till November 10th, but he returned and slept in his house on said premises on the night of October 24th, thereby claiming a *continuance* of residence. The Court below held that it was not *actual residence* sufficient to justify his declaration, hence the sale resulting was valid and judgment was for plaintiff. This judgment was affirmed.

IN *Zeile vs. Hood*, the plaintiff and defendant owned adjoining lots. Defendant gave notice to the plaintiff that he intended excavating his lot for the purpose of building, and requested him (plaintiff) to secure his walls from falling. The defendant himself underpinned plaintiff's wall at a cost of \$152.54, but the plaintiff believing the underpinning not sufficient to secure the wall, expended the sum of \$410.50. The question raised is whether the plaintiff shall pay defendant \$152.54, or whether the defendant shall pay the plaintiff \$410.50. The Court below gave judgment for the plaintiff and the Supreme Court affirms the judgment.

Supreme Court of the United States.

ABSTRACT OF DECISIONS.

CHARTERS.

Validity of State legislation altering Corporate Charters. By a general act of the legislature of Ohio, passed in 1851, provision was made for the consolidation of railroad companies, and it was declared that "such new corporation shall possess all the powers, rights and franchises" conferred upon the corporation of which it was made up. Subsequently, a constitution of the State went into effect, which declared that "no special privileges shall ever be granted, that may not be altered, revoked or repealed," and that corporations could only be formed under general laws which might be altered or repealed. Thereafter, two railroad companies, which were formed previous to 1851, consolidated themselves and formed a new corporation. *Held*, that the consolidation destroyed the old corporation, and the new corporation was subject to the provisions of the constitution, and the law under which it was formed might be altered so as to abridge the powers of such corporation. *Shields vs. The State of Ohio.* In error to the Supreme Court of Ohio. Opinion by Mr. Justice Swayne. Mr. Justice Strong dissenting. Judgment affirmed. Reported in full, 17 Alb. L. J. 105.

COMMON CARRIER.

1. *Contract for transportation over connecting lines: Power to make and liability under: Presumption.*—Defendant, a railroad company, contracted to carry sixteen car-loads of cattle for defendant from East St. Louis to Philadelphia. Nothing was said about a change of cars or about other companies. *Held*, that defendant might, unless forbidden by its charter, make a contract to carry cattle over connecting lines, and it would be liable in all respects upon other lines, as on its own. *Railroad Co. vs. Pratt*, 22 Wall. 123. In such cases the public has a right to assume that the contracting company has made all

the arrangements necessary to the fulfillment of the obligations it has assumed. *Railway Co. vs. Blake*, 7 H. & N. 987; *Buxton vs. R. R.*, L. R., 3 Q. B. 549; *Weed vs. R. R.*, 19 Wend. 534; *Knight vs. R. R.*, 56 Me. 240. Judgment of Circuit Court, E. D. Missouri, affirmed. *Ohio & Miss. R. R. Co., plaintiff in error, vs. McCarthy*. Opinion by Swayne, J.

2. *Ultra vires*; *When railroad corporation cannot set up*.—Injury was done to plaintiff's cattle by the delay and negligence of a connecting line to transfer them promptly. In an action against defendant for the loss, *held*, that defendant could not set up that the contract of shipment was *ultra vires*. When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. (*Union Water Co vs. Murphy's Co.*, 22 Cal. 620; *Morris R. R. Co. vs. R. Rd. Co.*, 29 N. J. Eq. 542; *Whitney Arms Co. vs. Burton*, 63 N. Y. 62.) Ib.

3. *Agency*; *Principal not bound by acts of agent beyond powers*.—A person sent with the cattle to take care of them, in order to get them forwarded over the connecting line, signed under protest a new contract. *Held*, that plaintiff was not bound by such contract so as to relieve defendant. Ib.

4. *Estoppel*: *Assigning new reason for act after suit brought*.—Defendant gave as a reason for neglect to ship the cattle, want of cars, and gave evidence to that effect on trial. Afterward he claimed that the Sunday law of West Virginia forbade the shipment of cattle on Sunday. *Held*, that this point could not be raised by defendant. Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. (*Gold vs. Banks*, 8 Wend. 567; *Holbrook vs. White*, 24 ib. 169; *Everett vs. Salters*, 15 id. 474; *Wright vs. Reed*, 3 Durnford &

East, 554; *Duffy vs. O'Donovan*, 46 N. Y. 223; *Winter vs. Coit*, 3 Selden, 294.) Ib.

DURESS.

What does not constitute.—To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland, as a doctrine established by the authorities, "a payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid." *Brumagim vs. Tillinghast*, 18 Cal. 266; *Mayor and City Council of Baltimore vs. Tefferman*, 4 Gill. 425; *Mays vs. Cincinnati*, 1 Ohio St. 268.—*Radich vs. Hutchins*. In error to the Circuit Court of the United States for the Eastern District of Texas. Opinion by Mr. Justice FIELD.

Judgment affirmed.

FIRE INSURANCE.

Conditions in policy: "*Entire unconditional and sole ownership*"—A policy of insurance, amongst other things, provided that "if the interest of the insured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, or if the buildings insured stand on leased ground, it must be so represented to the company and be so expressed in the written part of the policy, otherwise the policy shall be void." Two other stipulations were contained in the policy: (1) That "the use of general terms, or anything less than a distinct specific agreement clearly expressed and endorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein." (2) That the policy is made and accepted in reference to the foregoing terms and conditions, which are declared to be a part of the contract, and may be used and resorted to in order to determine the rights and obligations of

the parties to the policy. Nothing was expressed in the written part of the policy indicating or tending to indicate that the interest of the insured in the property purporting to be insured was any other than the entire, unconditional, and sole ownership of such property for the use and benefit of the insured, or indicating or tending to indicate that the buildings insured stood on leased ground. The fee-simple title of the land was in the plaintiff subject to a lease of the premises to another party for a term of years. *Held*, that the condition of the policy was not forfeited and defendant could recover for his loss.—*Lycoming Fire Ins. Co. vs. Haven et al.* In error to the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice CLIFFORD.

Judgment affirmed.

Recent Bankruptcy Decisions.

COMPOSITION.

Examination of bankrupt.—At the second meeting in composition, an opposing creditor may examine the alleged bankrupt touching the question of best interest of the creditors; and the alleged bankrupt may be directed to produce his books and papers to be used on such examination. U. S. Dist. Ct., S. D. New York. *In re Ash*, 17 Nat. Bankr. Reg. 19.

CONTRACT.

1. *With third party in consideration of forbearance of bankruptcy proceedings.*—The Bankrupt Act does not forbid the creditor of an insolvent debtor to take a contract or covenant from any third party, in consideration of forbearance to institute proceedings in bankruptcy against such debtor; such a transaction is not a violation of the Act or of public policy. But if such creditor has received a transfer of property from the debtor, having, at the time, knowledge or reasonable cause to believe the debtor to be then insolvent, the contract is without consideration, and there can be no recovery upon it. Ct.

of Appeals, Maryland, *Ecker vs. McAllister*, 17 Nat. Bankr., Reg. 42.

2. *Creditor receiving preference may not institute proceedings.*—No creditor who has received a preference, having, at the time, reasonable cause to believe his debtor insolvent, is authorized to institute proceedings in bankruptcy. The debtor cannot be admitted as a witness to testify as to his intent in making the transfer. Where the probable consequence of the act is to give a preference, he will be conclusively presumed to have intended to give such preference. Ib.

DISCHARGE.

When it will not be set aside.—Where the specifications filed in opposition to a discharge have been overlooked and a discharge granted, such error or irregularity is one which is the subject of review by the Circuit Court. Where proceedings for a review are not taken within the time prescribed by the rules of the Circuit Court, and the bankrupt has in the meantime acted upon his discharge the discharge will not be set aside for the purpose of having a trial on the specifications. Ignorance of the fact that a discharge has been granted is no excuse for a delay in making application to set aside. U. S. Dist. Ct., S. D. New York. *In re Buchstein*, 17 Nat. Bankr. Reg. 1.

INJUNCTION.

To restrain creditors of bankrupt : when granted : composition.—No injunction to restrain creditors from interfering with or molesting the bankrupt can be granted after the lapse of the full time provided by the terms of composition. This rule is applicable to a case in which the bankrupt has put in his answer to a suit in a State Court before the composition could be set up as a defense, and has been obliged to apply for leave to put in a supplemental answer setting up the composition and its fulfillment, where he has had ample time to apply for and obtain an injunction during the pendency of the composition proceedings. U. S. Dist. Ct., S. D. New York. *In re Nebenzahl*, 17 Nat. Bankr. Reg. 23.

HUSBAND AND WIFE.

Claim by wife against husband : waiver : jurisdiction : wife's separate estate.—An assignee in bankruptcy filed a petition asking a reference to the Register, with instructions to take an account of liens binding upon the bankrupt's real estate, and of their priorities, and to summon lien creditors to show cause against a sale of the real estate free of incumbrances. Pending that petition, in Court, in term, and in consequence of it, the bankrupt's wife preferred her petition in Court, praying a settlement out of a certain parcel of the bankrupt's real estate. By the same order of Court which granted the prayer of the assignee's petition, the wife's claim for a settlement was also referred to the Register, with instructions to take evidence and to make report in regard to it, as well as in regard to liens and their priorities. Six weeks after this order of reference, to wit: On the 8th day of December, 1877, the assignee and all lien creditors, having been summoned before the Register and been present before him, and being still before him, the Register made up his report as to the liens, and as to the wife's claim for a settlement. On the 12th of December, 1877, the Register presented his report in Court, in term, the assignee and lien creditors being present in person, or by counsel; and the assignee then filed exceptions to the report, these exceptions relating only to that part of the Register's report which treated of the bankrupt's wife's claim for a settlement. On this state of facts, it was, on sundry exceptions, *held*, (1) that although the wife could not have been required to submit her claim to the judgment of the Bankruptcy Court in the summary bankruptcy proceeding, yet that it was competent for her to waive her right to an adjudication on plenary proceedings, and to submit voluntarily to the adjudication of the Bankruptcy Court. *Held*, (2) that in the summary bankruptcy proceeding, it was sufficient that the assignee and lien creditors had had opportunity to produce evidence and make argument before the Register against the wife's claim for a settlement, and to file exceptions to the Register's report; and that they had had a day in Court to object to the report of the Register; and that, therefore, they had no right to insist that the wife, against

her wish, should be driven to a plenary proceeding in another Court. *Held*, (3) that clause *third* of section 4972, R. S. of U. S., gave full jurisdiction to the Bankruptcy Court over the subject-matter of the wife's "specific claim ;" to a settlement out of the bankrupt's estate ; and that her coming voluntarily into the Bankruptcy Court, by petition, to assert that claim, gave the Bankruptcy Court jurisdiction, personally as to herself, to "ascertain and liquidate" that claim. *Held*, (4) that where a wife's separate estate has been changed from one form of investment to another by an agreement between herself and her husband, and, before the title in the property newly acquired had been made to her, the husband becomes bankrupt, the Bankruptcy Court, as a Court of equity, in a case where its jurisdiction is clear, will treat that as done which ought to have been done, and decree a settlement upon the wife of property acquired with her separate means. U. S. Dist. Ct., W. D. Virginia. *In re Campbell, Ex parte Campbell*, 17 Nat. Bankr. Reg. 4.

PARTNERSHIP.

Indorsement of accommodation note in firm name.—Where one member of a firm indorses an accommodation note in the firm name, for the benefit of a third party, without the knowledge or consent of his copartner, such note cannot be proved against the firm assets. *In re Irving*, 17, Nat. Bankr. Reg. 22.

REDEMPTION.

When incumbrancer will not acquire title by assignee redeeming with general funds of estate.—During pendency of a bill in equity brought by the assignee for the redemption and sale of the bankrupt's real estate, an incumbrancer will not be permitted, by redeeming, to acquire any absolute title to the property to the exclusion of the assignee or the other incumbrancers. Where the assignee has used the general funds of the estate to redeem the real estate of the bankrupt from levy, at the request of the subsequent incumbrancers, the amount so paid should be refunded out of the proceeds of the sale of the premises. U. S. Dist. Ct., Maine. *In re Longfellow*, 17 Nat. Bankr. Reg. 27.

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Current Topics.

In *Coburn vs. Ames* the Supreme Court held that a District Court has power to appoint a Receiver in any action pending, and the appointment may be made *ex parte*, without notice; and that a receiver may be appointed after an appeal has been taken and perfected. The plaintiff cited § 564, Code C. P.; *Whitney vs. Buckman*, 26 Cal., 449; *Kerr on Rec'r.* 137, Note 1.; C. C. P., § 566; *Ireland vs. Nichols*, 1 Sweeney, 208; S. C., 37 Howard, 222; C.C.P., §§ 946 and 1049. The defendant says the District Court had no authority to appoint the Receiver after the appeal. Citing C. C. P. § 946; *Bryan vs. Berry*, 8 Cal., 130; *Thornten vs. Mahoney*, 24 Cal., 569; 26 Cal., 139; 28 Cal., 91; 47 Cal., 72; 49 Cal., 336; 20 Howard, 263, etc.

In *Monroe vs. McDonald* the Supreme Court affirms the judgment of the Court below. The plaintiff in this action sued the defendant for \$330 upon an undertaking given to release a certain attachment. The undertaking was in the required form. The value of the property released was fixed by the undertaking at \$330.

The defendant in his answer sets up as defense that the property was worth only \$111; that a portion of the property was tendered the Sheriff, which he refused; that he tendered the Sheriff, in place of the identical property, other property of precisely the same kind, quality, and amount, to apply upon the execution which was issued, and it was refused; that before executing the undertaking it was agreed that the

property might be replaced, and that he refused to sign the undertaking until such agreement was made.

The Court below gave judgment for the plaintiff.

In *Pacific Transfer Company vs. State Board of Harbor Commissioners*, the Supreme Court have just decided that no toll or wharfage can be collected from persons or companies engaged in the business of transporting travelers' baggage.

The Transfer Company was engaged in transporting travelers' baggage to and from and across the wharf of the defendants, and they (the defendants) demanded toll or wharfage. The plaintiff claims that while it is engaged in the transportation of travelers' baggage it is exempt from wharf dues and brings suit to recover moneys paid under protest.

An important decision as to the liability of railway companies for passenger's luggage was made in the English Court of Appeal in the recent case of *Bergheim vs. The Great Eastern Railway Co.* The plaintiff was traveling on the defendant's railway. He arrived at the station some time before the train was to start, and he directed one of the defendant's porters to place his traveling-bag in the carriage in which he intended to travel. The porter did so under the plaintiff's superintendence, and the plaintiff, after inquiring of the porter if the bag would be safe, and receiving a reply in the affirmative, went to another part of the station to get some refreshment. On his return to the carriage the bag was not to be found. To recover the value of the bag the plaintiff brought action. At the trial, the jury found that neither the plaintiff nor the defendant had been guilty of negligence, and on these findings the judge gave judgment for defendants which was affirmed on appeal.

Supreme Court of California.

JANUARY TERM; 1878.

[No. 5410.]

[Filed March 21, 1878.]

DAVIS vs. RUSSELL.

WAREHOUSE RECEIPTS—STAND ON SAME FOOTING AS BILLS OF LADING.—The assignment of a warehouse receipt will transfer the title to the goods, and it must necessarily follow that the possession of the receipt indorsed in blank is presumptive evidence of the ownership of the goods by the holder of the receipt.

SAME.—By Section 2,991, Civil Code, one who has allowed another to assume apparent ownership of property for the purpose of making any transfer of it, can not set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith in the ordinary course of business and for value.

SAME.—A pre-existing debt is a valuable consideration within the meaning of that Section.

Appeal from Fifth District Court.

Baldwin, Budd, Terry, McK. & Terry for Respondent.

Byers & Elliott and Hewell & Turner for Appellant.

Davis being the owner of a lot of wheat deposited it in the warehouse of Russell; took a warehouse receipt for it in the usual form, and thereafter indorsed the same in blank and delivered it to Barney. Barney transferred the receipt to the Bank of Stockton, and the bank transferred it to a person not a party to the action, and the wheat was afterward delivered by Russell to the holder of the receipt. The bank was notified by Davis that he had not sold the wheat to Barney, but the witnesses do not agree whether it was before or after the bank transferred the receipt. Before the wheat was delivered to the holder of the warehouse receipt, Davis made a demand upon Russell for a delivery of the wheat, but Russell refused so to do unless the receipt was returned to him.

Davis claims that Barney was only his agent for the sale of the wheat, and that he (Barney) transferred the receipt to the bank as security for an antecedent debt due from him to the bank. The defendants claim that Barney purchased the wheat from Davis, that he transferred the receipt to the bank not only as security for an antecedent debt, but also, for further advances which were afterward made, and that the transfer by the bank was prior to the time when it was notified that Davis had not sold the wheat to Barney.

The jury found for the plaintiff.

The Court was requested by the defendants to give the following instruction: "The possession of the instrument in writing produced in evidence, dated August 18, 1875, and called a warehouse receipt, covering this wheat in controversy, together with the plaintiff's indorsement thereon, is of itself presumptive evidence of the ownership of the grain, by the person having such possession of such receipt so indorsed;" but the Court refused to give the instruction, and gave the following instructions at the plaintiff's request: "If the jury believe from the evidence that the plaintiff did not sell the wheat in controversy to Barney, but authorized him to sell the same at a fixed price for cash, to be paid on or before delivery, then the indorsement and delivery of the warehouse receipt did not vest Barney with the title of said property, or deprive plaintiff of his title and right to the possession of the wheat." Also, that "the instrument in writing, called a warehouse receipt, is not a contract for the payment of money or personal property, and cannot be transferred by indorsement, like a negotiable promissory note." Other instructions were given embodying the same legal proposition. There was evidence introduced by the defendants tending to show that Barney had purchased the wheat from the plaintiff, and that the warehouse receipt indorsed in blank by the plaintiff, had been transferred to the Bank of Stockton, and by the bank transferred to a person not a party to the action, before the bank was notified by the plaintiff that he had not sold the wheat to Barney; and the defendants were entitled to have instructions given to the jury, which

would state the effect of such transfers of the warehouse receipt. The foregoing instruction, requested by the defendants, expresses very fairly the law in that regard. It was held in many cases in the English Courts that an assignment of such a receipt does not amount to a constructive delivery of the goods until the warehouseman is notified thereof, and agrees to hold the goods for the assignee, (*Benjamin on Sales*, §815.) No substantial reason is offered for giving to the assignment of such an instrument an effect differing materially from that of an assignment of a bill of lading. In *Horr vs. Baker*, 8 Cal., 613, a warehouse receipt was regarded as standing on the same footing as a bill of lading; and it was held that a transfer of such receipt operated as a transfer of the title to the goods. The doctrine of that case has not been questioned, so far as we are aware, by the courts of this State. If an assignment of the receipt will transfer the title to the goods, it must necessarily follow that the possession of the receipt, indorsed in blank, is presumptive evidence of the ownership of the goods by the holder of the receipt. The defendants were entitled to an instruction which would give them the benefit of that presumptive evidence, although as between the plaintiff and Barney, and those claiming under Barney, with notice that he was only the agent of plaintiff (if such was the fact), the plaintiff remained the owner of the wheat.

The Court also instructed the jury that "if you believe from all the evidence in this case that Davis did sell the wheat in question to Barney, your verdict will be for defendants. * * * If, however, you find that there was no sale of this wheat and that there was a demand and refusal of it by the party, then it is your duty to find a verdict for the plaintiff for a return of the wheat or its value." This instruction entirely ignores any rights which any of the defendants may have acquired in reliance upon the apparent ownership or authority of the holder of the warehouse receipt, and in that respect is erroneous. It is provided by the Civil Code, §2991, that "One who has allowed another to assume the apparent ownership of property, for the purpose of making any transfer of

it, cannot set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith in the ordinary course of business, and for value." The evidence seems to leave no room for doubt that the Bank of Stockton received the warehouse receipt from Barney in good faith, and in the ordinary course of business; and upon the authority of *Payne vs. Bensley*, 8 Cal., 260; *Robinson vs. Smith*, 14 Cal., 94; *Naglee vs. Lyman*, 14 Cal., 450; and *Frey vs. Clifford*, 34 Cal., 355, it must be held that the pre-existing debt of Barney to the bank constituted a valuable consideration within the meaning of that section. If the evidence brings the case within that section, neither the Bank of Stockton nor Russell would be liable to the plaintiff in this action.

Judgment and order reversed and cause remanded for a new trial.

[No. 5306.]

[Filed March 21, 1878.]

HAGAR vs. SPECT.

DEEDS, CONSTRUCTION OF.—Where two or more different descriptions occur in a deed, it must be construed most strongly against the grantor.

ESTOPPEL.—Where a party represents that he has power, and does execute a power of attorney to convey lands for another party, he and all parties claiming under him is estopped, when the title has come to his own hands, to deny that he had been duly authorized to execute the power of attorney.

Appeal from Tenth District Court.

Belcher and Good for Respondent.

Hart and Kirk for Appellant.

Action for the recovery of the possession of Block 90, in the town of Colusa. Both parties claim title under a patent issued to Larkin and Missroon, as the confirmees of the Jimeno grant. The Court below found that the title to the undi-

vided five-sixths of the premises in controversy was held by the plaintiff, and one-sixth by the defendant. The defendant appeals from the judgment and the order denying a new trial.

The first conveyance by either of the confirmees was made on the 23d day of September, 1851, and purports to have been made by Larkin for himself, and by Missroon, by Larkin as his attorney-in-fact, to Seawell and Hastings; and the deed purports to convey an "undivided two-thirds part of the following described tract or parcel of land, to-wit: Two Spanish leagues (or dos sitios de ganada major) of land on the west bank of the Sacramento River, part of the land formerly known as the Colusa Tract, including the town of Colusa, being a part of the eleven Spanish leagues granted by Don Manuel Micheltorena," to Jimeno, and sold by him to said Larkin and Missroon. The two leagues are further described by a reference to the grant to Bidwell, a sale by him to Semple, and a Sheriff's sale under execution against Semple.

It is unnecessary, for the purposes of this appeal, to determine whether the description is sufficient to amount to a conveyance of the whole of "two Spanish leagues of land;" but the inquiry may be limited to the question whether an undivided interest in the premises in controversy was conveyed. The two leagues mentioned in the deed are described as "including the town of Colusa."

The evidence shows that the town is within the bounds of the Jimeno grant; that at the time of the execution of the deed a map of the town had been made; that the northern and southern limits of the town had been fixed and established on the ground; that stakes had been set at the corners of several of the blocks; that a number of houses had been built; and that as applications were made for the purchase of lots, surveys were made in accordance with the map. From the fact that the Court found that the defendant had title to an undivided sixth of the block of land in controversy, and that he deraigns title under that deed, it is to be inferred that the Court found the town of Colusa had been laid out before the execution of the deed, and that the block in controversy is

a portion of the land which was then recognized as within the limits of that town. If the decision in that regard be correct, it must be held that the deed conveyed an interest in the lands within the town, however uncertain other descriptive portions of the deed may be.

The deed above mentioned was executed by Larkin, and purports to have been executed by Missroon, by Larkin, his attorney-in-fact, but it does not appear that Missroon had constituted Larkin his attorney-in-fact. The deed, therefore, is to be regarded only as the deed of Larkin. At the time of its execution he held the title to the undivided half of the land conveyed, and it must be construed as conveying his undivided half, although it purports to have been executed by Missroon, who was an owner of the title in common with Larkin.

The record does not contain any conveyance from Seawell and Hastings—the grantees in that deed—to the plaintiff or his grantors, and the decision that the plaintiff was the owner of the undivided five-sixths of the land was not sustained by the evidence, for he could not have acquired the title to more than three-sixths unless he acquired it under the deed to Seawell and Hastings. The defendant claims that the evidence shows that no interest in the town of Colusa passed to the plaintiff under the deeds through which he derives title. By one of these deeds William J. Eames conveyed to S. A. and James Morrison an undivided quarter of "nine Spanish leagues of land * * * commencing two Spanish leagues below or southerly from the tract of land on said river, known as the rancho of Larkin's children, and running thence along said river southerly nine Spanish leagues, and one league back or westwardly from said river," being part of the Jimeno grant, "which said tract was conveyed to said William J. Eames by Henry Coggill and wife" by deed dated May 31, 1852; "and being the same tract of land conveyed to the said Samuel A. Morrison and James Morrison by the said William J. Eames (as the attorney-in-fact of the said John S. Missroon) by deed bearing date the 20th day of April, A. D., 1852." The deed last referred to describes the land thereby conveyed as "lying

and being southerly and below the town of Colusa." The proposition is, in effect, that this description controls and limits all the other descriptive words in the deed of Eames to Morrison and Morrison. The first two descriptions appear both from the words themselves and from the extrinsic evidence relating to the boundaries of the land to be as certain as the third description; and therefore, in accordance with the rule requiring the deed to be construed most strongly against the grantor, it must be held that the first two descriptions prevail over the third; and as the evidence shows that the town of Colusa is included within the first two descriptions, it must be held that the deed conveyed an undivided fourth of the town of Colusa, if Eames held that interest.

It is further contended by the defendants that the land in controversy is excepted from the deed of Missroon to Coggill; and if not in fact excepted, that Eames, and the plaintiff claiming under him, are estopped to assert title to the premises. The deed contains the following exception: "Also excepting therefrom such parts thereof as may be sold by agent of said parties of the first part [Missroon and wife] before receiving due notice of this conveyance." The defendant introduced in evidence a power of attorney, dated September 24, 1851, executed by Larkin and Missroon, by Eames, also by Seawell and Hastings to Carpenter, authorizing him to convey lots in Colusa; and he also introduced a deed dated December 12, 1851, purporting to have been executed to Monroe, by Larkin, Missroon, Seawell, Hastings and Hughes, by Carpenter their attorney-in-fact, conveying the premises in controversy. It is claimed that the power of attorney and the deed (both of them having been made before the deed of Missroon to Coggill) prove that the premises therein described are within the exception contained in the deed of Missroon to Coggill. But we are of the opinion that this position cannot be sustained. For they do not prove, as against Missroon, that Eames was his agent. There is more force, however, in the position that the plaintiff is estopped to deny that Eames was such agent. The plaintiff claims title through the deed of Missroon to Coggill and the deed of Coggill to

Eames. The boundaries of the land described in those deeds, as already remarked, include the premises in controversy, and Eames by the execution of the power of attorney, as the attorney in-fact of Missroon, whereby he purported to confer upon Carpenter authority to convey the premises, represented that he held competent power from Missroon to constitute Carpenter the agent of Missroon, with authority to sell and convey the premises. Although the power of attorney might not bind or affect Missroon, in the absence of proof that he had authorized Eames to execute it, yet when the title came to the hands of Eames from Missroon, Eames was estopped to deny that he had been duly authorized to execute the power of attorney. Its purpose was to induce those desiring to purchase lots in Colusa, to believe that he had power in the name of Missroon to authorize Carpenter to sell and convey the lots, and purchasers relying thereupon, as they were entitled to do, would be injured were Eames now permitted to deny that he possessed the power, which by the execution of the power of attorney he professed to have. The act of Eames and the acceptance of the conveyance executed by Carpenter as such attorney-in-fact contain all the elements of an estoppel *in pais*, and in our opinion, became binding and effectual as against Eames, as soon as the title vested in him, and bind those claiming title under him.

Judgment and order reversed and cause remanded for a new trial.

[No. 5159.]

[Filed, March 26, 1878.]

McCARTHY vs. POPE.

STATUTE OF FRAUDS — WHEN NOT APPLICABLE.— When a party, by parol, agrees to purchase certain real estate, and then, by parol, gives the benefit of the purchase to a third party for a consideration, the transaction is not within the statute of frauds; and if the owner of the lands makes the deed to the said third party, and a benefit and advantage is thereby gained by said third party, an

action will lie against the said third party on his contract to pay for the benefit of purchase.

Appeal from Fifteenth District Court.

Pringle & Hayne for Appellant.

Jarboe & Harrison for Respondent.

This was an action of assumpsit. Plaintiff was non-suited on his opening statement to the jury. The substance of the statement is as follows: One Richardson was the owner of certain valuable real estate. The plaintiff had a parol agreement with Richardson for the purchase of said real estate at \$200,000. Plaintiff not being able to conveniently raise so much money, made a parol agreement with the defendant to let him have the benefit of the bargain for a certain sum. Richardson then, by direction of plaintiff and in pursuance of his agreement to that effect with plaintiff, executed a deed of the property to the defendant. Defendant refuses to pay plaintiff anything, and the plaintiff sues upon the implied contract to pay what the purchase was reasonably worth.

PER CURIAM.

The case of the plaintiff is not like *Meyers vs. Childs*, 47 Cal., 142, as supposed by the Court below. In that case the vendor of the stock repudiated the alleged contract, and so the transaction turned out to be of no benefit to the defendant there. But here the defendant did obtain an advantage and acquired the title to a large property by means of the contract made by him with McCarthy, and upon which this action is brought.

We think that the views expressed by Lord Chief Justice Best, in *Seaman vs. Price*, 10 Moore, and by the Supreme Court of the State of Missouri, in *Kratz vs. Stocke*, 42 Mo. 351, are appropriate to the case before us, and upon the principles maintained in those cases the judgment given below should be reversed here.

Judgment reversed and cause remanded for a new trial. Remittitur forthwith.

Rhodes, J., expressed no opinion.

[No. 5713.]

[Filed March 26, 1878.]

DOWD vs. CLARK.

SPECIFIC PERFORMANCE—TENDER.—When by the terms of a lease the lessee may elect to purchase at any time during the term, upon the payment of a certain sum, and does give notice to the lessor that he has so elected, the lessor waives the necessity of a tender before suit is brought, when he ignores the right of the lessee to purchase.

WHAT AVERMENTS ENTITLE A PLAINTIFF TO SPECIFIC PERFORMANCE.—It is sufficient when the plaintiff avers that he is ready and willing, and offers to comply with all the terms and conditions of the agreement, and to pay any sums that may be due the defendant under the contract.

Appeal from Fifteenth District Court.

Delmas for Appellant.

Williams & Thornton for Respondent.

As we construe the lease of March 27, 1866, it provides: First, that the lessee may elect to purchase at any time during the term, in which event he shall pay to the lessor during the term the sum of \$6,000 in gold coin, with interest from the *date of the lease* at the rate of one per cent. per month, and any payments, which, in the meantime, shall have been made for rent, shall be credited on the interest; second, that if the lessee elects to purchase, he shall also pay in addition to the principal and interest, whatever sum shall in the meantime have been levied on the land and paid by the lessor for taxes from the date of the lease; third, that from the time the lessee elects to purchase, the interest shall *thenceforth* be paid on the first days of January and July in each year; and, if not so paid, shall be compounded at the rate of two per cent. per month, until paid; fourth, that if the lessor shall have incurred expenses by reason of the failure of the lessee to perform the covenants by him to be performed, the same shall be refunded by the lessee with interest at the rate of two per cent. per month, compounded monthly.

There is no conflict in the evidence as to the fact that before the suit was brought the plaintiff notified the defendant during the term that he elected to purchase under the pro-

visions of the lease, and tendered the sum of \$6,000 in gold coin; but the defendant refused the tender, and denied that the plaintiff was entitled to purchase under the lease. He ignored altogether the right of the plaintiff to purchase, and on well settled principles this was a waiver of the necessity of a tender before suit brought. But in his complaint, the plaintiff avers that he is ready and willing, and offers to comply with all the terms and conditions of the agreement, and to pay any sums that may be due the defendant for the purchase of said premises under the contract. This, we think, is sufficient to entitle him to a specific performance of the agreement.

It is unnecessary to determine on this appeal whether the interest ceased from the time of the tender and the refusal of the defendant to recognize the plaintiff's right to purchase.

Judgment and order reversed and cause remanded for a new trial.

[No. 5205.]

[Filed March 26, 1878.]

THE PEOPLE vs. LATHAM.

DELINQUENT TAXES — POWERS OF LEGISLATURE — ACT OF MARCH 28, 1874, CONSTITUTIONAL.—Section 11, Article I, and Section 13, Article XI, are not violated by the Act of March 28, 1874. The Legislature may levy a tax either before or after the value of property is ascertained; and the provision in the Act that the amounts that had been previously paid in pursuance of an invalid levy should be credited as a payment *pro tanto* is not an exemption of such property from taxation.

Action to recover delinquent taxes, levied by the Act of March 28, 1874, (*Stats. 1873-4*, p. 746) for the twenty-fourth and twenty-fifth fiscal years.

The tax is attacked on the ground that it violates Section 11, Article 1, of the Constitution—"All laws of a general nature shall have a uniform operation;" and also Section 13, Article 11—"Taxation shall be equal and uniform through-

out the State." The objection cannot be sustained, for the statute purports to levy a tax upon all property in the State, subject to taxation for each of those fiscal years.

The Constitutional provision that "All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law," does not require the value of the property to be ascertained after the passage of the act fixing the rate of taxation. That requirement is satisfied by the ascertainment of the value of the property as directed by law; and the Legislature may levy the tax, either before or after the value of the property is ascertained, without any violation of the fundamental rules upon which taxation is based, or indeed any rule of sound financial policy.

No portion of the property liable to taxation for those fiscal years is exempted from taxation. The provision in the act, that the several amounts which had been paid on the property, in pursuance of a previous invalid levy of taxes, should be credited as a payment, *pro tanto*, of taxes levied by this act, does not amount to an exemption of such property from taxation; and if that provision of the act should be construed as intending that such property would be exempt from taxation, the provision should be void, because in violation of the constitutional provision that *all* property in the State shall be taxed in proportion to its value.

We see no error in the proceedings or judgment.

Judgment and order affirmed. Remittitur forthwith.

We dissent.

WALLACE, C. J.

McKINSTRY, J.

[No. 5587.]

[Filed March 26, 1878.]

STOW vs. KIMMER.

TRESPASS—WHEN ACTION WILL NOT LIE.—When the defendant is in adverse possession of lands, claiming the right of possession, and was still in possession at the time the action was brought, the plaintiff can not maintain an action of

trespass or a bill to prevent the commission of supposed acts of trespass on said premises.

The findings show that at the time of the commission of the alleged trespasses the defendants were in the adverse possession, claiming the right to the possession of the tract of land upon which the alleged trespasses were committed, and still continued in possession at the time of bringing the action.

Under these circumstances the plaintiff cannot maintain an action of trespass, or a bill to prevent the commission of supposed acts of trespass on the premises by the defendants.

Judgment affirmed.

[No. 5469.]

[Filed March 27, 1878.]

STANWAY vs. RUBIO.

On the 9th of April, 1868, George Dalton and Manuel Abril made an agreement with Miguel Moro and others, of the second part, in consideration of certain releases, to make application to purchase from the State of California, as lieu lands, Section 9, in Township 2 south, Range 13 west, in the county of Los Angeles, and when they obtained a patent for the same to execute deeds for all or any of said land in said section which may be now occupied and possessed by said parties of the second part, such conveyances to be made in severalty to each of said parties, in accordance with their respective fences and inclosures, and in accordance with the lines of their respective possessions as heretofore surveyed by Hanson, County Surveyor. Plaintiff deraigned title from Moro, one of the parties to the agreement.

Rubio, the defendant, was not a party to the agreement, and claims title through Widney, who purchased from Abril.

PER CURIAM.

At the trial plaintiff claimed to deraign title from Moro, who, so far as the record shows, never had any right, interest or estate in the demanded premises. The lands in controversy are neither included within the fences or inclosures of any of the parties of the second part to the agreement of April 9, 1868, nor within the lines of the respective possessions of said parties *as surveyed* by Hansen, County Surveyor, or as indicated by the green lines upon the Hansen map.

Judgment and order denying new trial reversed, and cause remanded for new trial. Remittitur forthwith.

[No. 5662.]

[Filed March 27, 1878.]

MEEEKS vs. SOUTHERN PACIFIC R. R. CO.

CONTRIBUTORY NEGLIGENCE—NOT ABROGATED BY SECTION 486 OF THE CIVIL CODE.—The 486th Section of the Civil Code, providing that a railroad corporation shall be liable for all damages sustained by any person, and caused by the locomotive of the corporation, when a bell is not sounded or a whistle blown, as directed by that section, does not abrogate the doctrine of contributory negligence, or operate to give a right of action, if an adult, or an infant, by the negligence of the parent, materially and proximately contributed to the injury.

SAME—CASE.—The plaintiff, an infant of six years, was permitted by his parents to make use of the roadway of the defendants as a play-ground, and to lie down on the track unattended. *Held*, that such conduct amounted to negligence *per se*, which would defeat a recovery by plaintiff, there being no evidence showing lack of due diligence or care on the part of the railroad company.

Appeal from Eighteenth District Court.

Rowell and Paris for Respondent.

Glassell, Chapman & Smith and Satterwhite for Appellant.

1. The 486th section of the Civil Code, providing that a railroad corporation shall be liable for all damages sustained by any person and caused by the locomotive of the corporation, when a bell is not sounded or a whistle blown, as di-

rected by that section, does not abrogate the doctrine of contributory negligence, or operate to give a right of action where the negligence of the plaintiff, if an adult, or if an infant, as here, the negligence of the parent or person standing *in loco parentis*, materially and proximately contributed to the injury.

2. The jury, in response to the special issues submitted to them, found that neither the infant, plaintiff, nor his parents were chargeable with negligence which contributed to the injury of the plaintiff. The defendant moved the Court below for a new trial, on the ground that the evidence did not support the verdict in these respects. The motion was denied in the Court below. We think it should have been granted.

The plaintiff, an infant of some six years, seems to have been permitted by his parents to make use of the roadway of the defendants as a play-ground, and to lie down on the railroad track unattended. As to whether he was asleep upon the track or awake, there is some conflict in the evidence. But this is not material, for in either case such conduct amounted to negligence, *per se*, which would defeat a recovery by the plaintiff here. It should be observed in this connection, that there is no evidence whatever of the lack of diligence and due care upon the part of those in charge of the train. The plaintiff was lying on the track, parallel with the rails, as he was discovered by the engineer and lookout at some distance ahead, but, notwithstanding a continued scrutiny exercised by them, they were unable to discern that the object at which they were looking was other than a bush, or some insignificant obstruction upon the track. When they did discover that a child was lying there, they used every endeavor to slow up the train, but it was then too late to prevent the accident by any, even the utmost effort upon their part. Under the circumstances, as now apparently in proof, we are constrained by the settled rules of law, applicable to cases of this character, to hold that the plaintiff ought not to have recovered for the injuries sustained by him.

Judgment and order reversed and cause remanded for a new trial.

[No. 5490.]

[Filed March 27, 1878.]

DORN vs. HOWE.

HOMESTEAD—RESIDENCE.—Actual residence at the time of filing the declaration necessary to constitute a homestead.

Appeal from the 20th District Court. This was an action of ejectment. The plaintiff claims title under execution sales. The defendants claim the property as a homestead. The Court below found that the defendant did not reside on the premises at the time of filing the declaration, but gave judgment for the defendant. Plaintiff appealed. Alexander & Sommerton for appellant; W. H. Webb for Respondent.

PER CURIAM.

The defendant was not residing on the premises in controversy at the time the declaration of homestead was filed. An actual residence thereon *at the time of the filing of the declaration* is required by the Statute (Civil Code, Sec. 1263). The Statute has been so construed here in several cases—the latest of which is *Babcock vs. Gibbs*, (No. 5669), at the last October Term.

Judgment reversed and cause remanded, with directions to render judgment for the plaintiff, in accordance with the prayer of the complaint.

Bankruptcy Decisions.

FRAUD.

The “fraud” referred to in the 33d Section of the Bankrupt Act (U. S. R. S., Section 5117) is positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. *Neal vs. Scruggs et al.*, Exrs, etc., N. B. R. 102.

JURISDICTION.

Residence or carrying on of business in the district for six months is a jurisdictional fact, and the petition must contain an allegation showing it. But, upon an application for a discharge, the creditors may show that the alleged ground of jurisdiction did not exist.

In a proceeding against a copartnership the court must acquire jurisdiction over all the members of the firm in order to have jurisdiction over any of them.

Where the petition against a copartnership alleged as the ground of jurisdiction that all the members of the firm had resided in the district for the necessary period, the fact that one of such members had not so resided defeats the jurisdiction of the court as respects the entire case. *In re Oliver B. Beals et al.*, N. B. R. 107.

COMPOSITION.

A resolution of composition was adopted in this case, by which the creditors agreed to accept notes of a new firm to be composed of two members of the old firm and such other person or persons, if any, as they might associate with them, with a fresh capital of at least twenty thousand dollars, which, if borrowed, should not be withdrawn until the composition was paid. The new firm was formed of all the members but one of the old firm, with the capital required, and a deed of release was signed by the creditors. The capital had been borrowed and was repaid soon after. The new firm paid the first and second installments of the composition, but stopped payment on the third. A day or two before this the case had been dismissed. *Held*, that the dismissal should not be vacated and the case sent back into bankruptcy, because (1), creditors of the new firm could not prove their debts or be paid in this proceeding, and (2), because the remaining partner, himself innocent, lost his opportunity, by the discharge, of seeing that the composition was faithfully and fully carried out. *In re Ewing & Co.*, N. B. R. 109.

MERCHANT.

A saloon-keeper who purchases liquors and cigars in quan-

ties, and some on credit, and sells them at retail for cash and on credit, is a merchant or tradesman within the meaning of the seventh subdivision of Section 5110. *In re Benson Sherwood*, N. B. R. 112.

SET-OFF.

The bankrupt was extensively engaged in manufacturing flour and storing grain in an elevator attached to its mill. Defendant, prior to the bankruptcy, and in ignorance of the insolvency of the corporation, purchased a storage receipt which had been issued by it, and subsequently demanded a delivery of the grain, which was refused. In an action brought by the assignee to recover money of the bankrupt which the defendant had in his possession at the time of adjudication. *Held*, that the value of the grain so converted might be set-off.

Where the set-off is founded on a duty which the plaintiff owes the defendant, the wrongful act can be waived and a set-off is proper; but where the cause of action is a tort, then the lawful act cannot be waived. *McCabe, Assignee, etc. vs. Winship*, N. B. R. 113.

PROVABLE DEBTS.

Provable debts created by fraud are included in and bound by a composition in bankruptcy. An injunction to restrain the prosecution of an action against the bankrupt in a State court, during the pendency of a composition, is proper where installments of the composition have been tendered to the creditors, and the bankrupt is not permitted to plead the composition as a bar to the action. *In re Shafer & Wesselhoeft*, N. B. R. 116.

EXEMPTION.

The interest of a tenant in common, not exceeding five thousand dollars in value, in the dwelling-house and land actually occupied by him as a homestead is, by the Nevada Constitution and Laws, exempt from forced sale. *In re Swearinger & Lamar*, N. B. R. 138.

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Current Topics.

THE removal of the records of the Supreme Court to Sacramento, for the April Term, to be held at that place, accounts for the absence this week of our usual notes of unwritten opinions. Our attorney at Sacramento will prepare them for our next issue. This great inconvenience to all who have occasion to consult the records has been remedied by the new bill, which soon goes into effect, requiring separate records to be kept at each place of holding terms.

THE Governor signed the bill permitting women to become attorneys-at-law. Practically, we attach no importance whatever to the new law. Mr. Glover introduced a bill in Congress to allow women to be admitted to practice before the Supreme Court of the United States. The bill passed the House of Representatives, but is now pending in the Senate upon an adverse report of the Judiciary Committee. Their report is that Congress had no power to regulate the admission of attorneys to the Supreme Court of the United States; that the power is exclusively in the Court. The action of the Senate upon the report may be quite material, should our Supreme Court attempt to declare its power and exclusive right to say who shall be admitted to practice before it, notwithstanding the legislative act. Unless the Constitution of our State gives this power specially to the Legislature our Supreme Court could, with as much consistency, declare its sovereignty in such matters.

Supreme Court of California.

JANUARY TERM, 1878.

[No. 5,602.]

[Filed March 30, 1878.]

NISBET vs. NASH.

MINING PARTNERS, WHO ARE.—John Nisbet, the plaintiff's grantor, and the defendant Nash, sold an undivided one-half of certain mining grounds to the defendants Fletcher and Sexey. All began working and contributing to the development of said claim; but finding that it was unproductive, suspended work. The plaintiff again, and without the consent of the defendants, began work, and expended further money on said property. The Court below held that the plaintiff and defendants were not mining partners. *Held*, error.

This is an action for a partition of mining property and for an accounting of the partnership transactions growing out of the mining partnership. In September, 1865, the defendants, Nash and John Nisbet, conveyed to the defendants, Sevey and Fletcher, the undivided one-half of the mining ground involved in the action. The four then procured a patent of the United States for the ground.

Between 1865 and 1869, they expended in opening the mines more than \$3,000. The operations on the mines were then discontinued till the winter of 1869-70. John Nisbet, it is alleged, without consulting the others, did in 1870 begin the work again and expended the sum of \$1,700. Afterward the said John Nisbet conveyed to his brother William, the plaintiff in this case, his one-fourth interest in the mine. William Nisbet afterward commenced work on the mine and expended labor and money in further developing it. The defendants did not give their consent to this, and refused to furnish money or labor.

The plaintiff now brings this action for a partnership accounting.

The Court below found that the plaintiff and defendants were not mining partners, from which judgment the plaintiff appealed. The defendant also appealed from other orders of the Court.

Belcher and Belcher for defendants.

The owners of a mining claim are tenants in common in the ownership of the mine. In the working of it they are mining partners. This partnership begins when by the consent of the parties work on the mine begins, and it ceases when the work ceases. Civil Code, Sec. 2,511; *Duryea vs. Burt*, 28 Cal. 569.

A majority in interest of the part owners of a mine have a right to control the business of working. Civil Code, Sec. 2,520; *Dougherty vs. Creary*, 30 Cal. 300.

P. O. Hundley for plaintiff.

When Fletcher and Sexey purchased an undivided one-half of the mining claim from Nisbet and Nash and engaged in working the claim, expending \$3,000, they became mining partners. Civil Code, Sec. 2,511; *Taylor vs. Castle*, 42 Cal. 370; *Duryea vs. Burt*, 28 Cal. 578; *Dougherty vs. Creary*, 30 Cal. 300.

In the bond defendants executed for the purchase money they obligated themselves to work the mine to pay the amount of the bond.

The sale made by John Nisbet to Wm. Nisbet did not dissolve the copartnership. Civil Code, Sec. 2,516; *Duryea vs. Burt*, 28 Cal. 569; *Taylor vs. Castle*, 42 Cal. 370.

The partners are mutual agents of each other in all things which respect the copartnership, and the act of one in the name of all in their common business is obligatory on the others. Story on Agency, Sec. 37.

PER CURIAM.

The Court erred in finding that plaintiff and defendants were not mining partners. They were.

The Court should have found, whether or not the partnership had been dissolved.

If, on a re-trial, the District Court shall find that the partnership has been dissolved, the decree must be for an accounting. If the Court shall find that it has not been dissolved, it will become its duty to determine, whether or not, plaintiff is entitled to a decree of dissolution ; and if it shall find that plaintiff is entitled to such decree, the decree should also provide for an accounting.

It is not necessary to determine, whether John Nisbet is a necessary party to this action or any accounting.

Judgment and orders denying new trial reversed and cause remanded for a new trial—each party to pay one-half of the costs of these appeals.

[No. 5,533.]

[Filed March 28, 1878.]

THOMPSON vs. CORPSTEIN.

ESTRAY CATTLE—WHAT ARE NOT UNDER THE ACT OF MARCH, 1874.—Cattle passing over and along a public road in charge of a herder, and not being upon the road for the purpose of being pastured there, and in passing did casually eat of the grass growing at the roadside, are not estrays and subject to proceedings under the Statute of March, 1874.

SAME.—The Court below found that the plaintiff's cattle had been driven to Wolf Creek for the purpose of being watered, and while there in the charge of a herder, who had fallen asleep for the moment, were found pasturing upon both sides of the road. *Held*, that in the absence of an intent to so pasture them, the cattle would not be subject to proceedings under the Act.

In the Statute of March, 1874, concerning roads and highways in the county of Santa Clara (§37), it is enacted that no stock of any kind shall be “ allowed to pasture upon any public highway, and it shall be the duty of any roadmasters and deputy roadmasters, within their respective districts, to take up all animals found pasturing upon the public highways, and to deal with said animals as provided in an act to amend an act concerning estrays and animals found running at large in the county of Santa Clara,” etc.

Upon reference to the latter act it is therein provided,

that the estray cattle, or cattle running at large upon any public road, may be taken and impounded.

It is apparent that both acts deal with the case of cattle running at large, or being estray, and not with cattle passing over and along a public road in charge of a herder, and not being upon the road for the purpose of being pastured there.

It was not the intention of the act that cattle being driven along the road in charge of a herder, and which, in passing, should casually eat of the grass growing at the roadside, should for that reason be subjected to proceedings by the roadmaster under the act first referred to. The Court below found that the plaintiff's cattle had been driven from the plaintiff's land to Wolf Creek upon the Stephen's Creek road for the purpose of being watered, and while there in charge of a herder, who seems to have fallen asleep for the moment, were found pasturing upon both sides of the road.

There is no pretense that the plaintiff, or the herder, intended that the cattle should pasture upon the road and that they were found eating the grass there, was owing solely to the accident of the herder falling asleep for the moment, while in charge of the cattle. Had he fallen down in a fit, or been disabled by a sudden attack of disease, the same consequence might, and probably would have ensued, but we do not think that in the one case, more than in the other, the cattle would be subject to proceedings under the Act.

We are of opinion that the conclusion of law, second in number, deduced by the Court below, "That the plaintiff was pasturing and permitting to pasture, the cattle referred to, upon said highways, when the same were seized by the defendant," cannot be supported upon the facts found at the trial.

The action is replevin, and the facts as to the value of the cattle, and the damage, if any, sustained by the plaintiff, are put in issue by the pleadings, but are not determined by the findings. We cannot, for this reason, direct final judgment for the plaintiff here, and there must be a new trial of the action below.

Judgment reversed and cause remanded for a new trial.

[No. 5,774.]

[Filed April 1, 1878.]

WATSON vs. CORNELL.

RECORD ON APPEAL — WHAT IT MUST CONTAIN. — The record must contain a copy of the undertaking on appeal. The omission is not cured by the certificate of the clerk, that a good and sufficient undertaking on appeal in due form of law has been executed, and is on file in said action in his office.

The appeal in this case was dismissed without prejudice. The record did not contain a copy of the undertaking on appeal. The Clerk's certificate is in these words: "I, W. P. Hall, County Clerk of Lassen County and ex-officio Clerk of the District Court in and for said Lassen County, do hereby certify that the foregoing are full, true, and correct copies of the orginal papers now on file in my office in the said action, namely: 1. The complaint; 2. The amended answer; 3. The finding; 4. The judgment; 5. The notice of appeal; 6. The statement on appeal; 7. This certificate.

"And I further certify that a good and sufficient undertaking on appeal in due form of law has been executed, and is now on file in said action in my office.

"In witness whereof I have hereunto set my hand, and affixed my official seal, this 28th day of August, 1877.

"W. P. HALL, Clerk."

PER CURIAM.

The record does not contain a copy of the undertaking on appeal, nor does the certificate of the Clerk, as far as it relates to the undertaking on appeal, conform to Section 953 of the Code of Civil Procedure.

Appeal dismissed, without prejudice to another appeal.

[No. 5,671.]

[Filed April 3, 1878.]

BILLINGS vs. DREW.

PRACTICE AND PLEADINGS—AFFIRMATIVE AND NEGATIVE DEFENSES.—Where the answer of a defendant contains several denials, and also an averment of new matter as a defense, it is erroneous to deprive the defendant of the benefit of the denials contained in their answer. The defendant has a right to set up negative as well as affirmative defenses to an action, and the affirmative matter, separately pleaded, does not operate as a waiver or withdrawal of the denials contained in other portions of the answer.

The answer of the defendant contained several denials and one averment of new matter relied upon as a defense. The denials were: First—That plaintiff was owner of the personal property mentioned in the complaint. Second—That the plaintiff had, at any time, the possession of said personal property. Third—That the defendants took the property from the possession of the plaintiff. The new matter set up in the answer was to the effect that the property was the property of Woods, and that it was taken by the defendant Drew, as Sheriff, by virtue of a writ of attachment issued against Woods at the suit of the defendant Skaggs, and in this connection, and as part of the affirmative defense, it is alleged that the plaintiff claims the property “under and by virtue of a pretended purchase thereof from the said A. S. Woods, and that said pretended sale of said goods and chattels by the said Woods to plaintiff, if made at all, was made fraudulently and for the purpose of hindering and delaying creditors of the said A. S. Woods in collecting their just debts, and particularly,” etc.

In this condition of the pleadings the Court below, at the instance of the plaintiff, gave the jury the following instruction:

“The defendants in their answer seek to justify the taking of the property under an attachment issued out of this Court on the 24th day of October, 1876, in an action in which the defendant E. M. Skaggs was plaintiff, and A. S. Woods and John N. Larkin were defendants, which the defendants allege

was levied upon the property by the defendant Drew, as Sheriff, as the property of A. S. Woods, and they allege that Billings, the plaintiff, claims to be the owner of said property under and by virtue of a purchase thereof from A. S. Woods, and that the sale by Woods to the plaintiff was made fraudulently for the purpose of hindering and delaying the creditors of said Woods in collecting their just debts, and particularly the defendant E. M. Skaggs. By these averments the defendants admit there was a sale of the property by Woods to the plaintiff, which was a valid sale as between said Woods and the plaintiff, and as the defendants seek to avoid the sale on the grounds that it was made for the fraudulent purpose of hindering and delaying the creditors of said Woods, the burden of proof is upon the defendants to show affirmatively by a preponderance of evidence that said sale was made by Woods for the fraudulent purpose of hindering and delaying his creditors or the defendant E. M. Skaggs out of his debt; and if the evidence in this case fails to show that said sale was made by Woods to the plaintiff for the purpose of hindering or delaying the creditors of said Woods, you will find a verdict for the plaintiff."

This instruction was erroneous, in that it deprived the defendants of the benefit of the denials contained in their answer. They had the right to set up negative as well as affirmative defenses to the action, and the affirmative matter, separately pleaded, did not operate as a waiver or withdrawal of the denials contained in other portions of the answer. (*Buhne vs. Corbett*, 43 Cal. 264).

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

[No. 5,744.]

[Filed April 1, 1878.]

PULLIAM vs. CHEROKEE FLAT BLUE GRAVEL CO.

PRACTICE AND PLEADINGS — EVIDENCE. — The circumstance that an application to obtain title had been filed in the United States Land Office does not tend, even in the most remote degree, to show exercise of control over the premises, and to admit such evidence for such a purpose is error.

Belcher and Belcher for plaintiff.

P. O. Hundley for defendants.

This was an action to quiet title to mining ground. The Court below permitted the defendant to introduce the testimony set forth in the opinion which was *held*, error. There were other errors assigned, but the order denying new trial was reversed for the one referred to alone.

PER CURIAM.

The corporation defendant was permitted, against the objection of the plaintiff, to prove that it had made an application at the United States Land Office to obtain the title to the premises in controversy. The avowed purpose of this proof was to show that the defendant had exercised control and dominion over the premises. But the circumstance that such an application had been filed in the Land Office did not tend, even in the most remote degree, to show the exercise by the applicant of control over the premises.

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

Remittitur forthwith.

[No. 5,189.]

[Filed April 1, 1878.]

LUCE vs. ZIELE.

Wm. M. Stewart for defendant and appellant.

L. S. Taylor for plaintiff.

This was an action by Luce for money alleged to have been due him upon a contract for threshing. It appears that he made the contract with one McCormick, who had a contract for harvesting defendant's grain, and that after he had worked a while he began to entertain doubts as to the certainty of his pay. He then went to see the defendant who was the owner of the grain being threshed, and who was the owner

of the ranch also. He was referred by the defendant to his brother, John Zeile. The plaintiff, it is claimed, stated to John Zeile that he had not been paid by McCormick, and that he would do no more work unless he knew he was going to get pay for it. He was told by John Zeile that when the work was done he should get an order from McCormick for the amount, and that he would pay him. He did finish the work and got an order for the whole amount of his bill for the labor performed under his contract with McCormick, and for that performed afterward. McCormick failed.

The Court below gave judgment for plaintiff. The defendant claimed that the contract relied upon was an agreement to pay the debt of another, and not being in writing was void; that the defendant had employed McCormick to do the work, and that McCormick, if any one, was liable to the plaintiff.

PER CURIAM.

It does not appear how much of the claim for which the plaintiff recovered accrued before, or how much accrued after the failure of McCormick, and the alleged conversation had by the plaintiff with Dr. Zeile and John Zeile.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 10,313.]

[Filed March 28, 1878.]

PEOPLE vs. WONG SHU SHUT.

The defendant was convicted of the crime of murder in the first degree, and moved for a new trial on the ground, among others, that the verdict was contrary to the evidence, and the motion having been denied, he brings this appeal.

Upon a careful examination of the record, no evidence is

found tending to show the death of the person alleged to have been killed by the prisoner. The practice to be pursued by the District Attorney in the settlement of bills of exception in criminal cases where a motion of this character has been denied was pointed out in *People vs. Fisher* (51 Cal. 319), and upon the authority of that case the judgment and order denying a new trial must be reversed and the case remanded for a new trial, and it is so ordered.

Circuit Court of the United States,
DISTRICT OF NEVADA.

THE EUREKA CONSOLIDATED MINING COMPANY
vs.
THE RICHMOND MINING COMPANY.

1. **JURISDICTION AFTER BILL DISMISSED—INJUNCTION.**—Where an injunction against working a mine pending a suit in equity has been dissolved by decree upon final hearing, the bill dismissed without qualification, the decree enrolled and an appeal taken in such form as to operate as a *supersedeas*, the Court rendering the decree has no jurisdiction, thereafter, to restrain the successful party from working the mine pending the appeal.
2. **INJUNCTION—STATUTORY PROVISIONS.**—Section 1,182, Revised Statutes of Nevada, authorizing the Court to require the complainant to give security for injuries resulting to defendant from his acts pending the litigation, and in default thereof to dissolve any injunction in his favor, relates to cases still pending, not to cases already in judgment and closed.

SAWYER, Circuit Judge, HILLYER, District Judge, concurring.

The Eureka Consolidated Mining Company brought an action against the Richmond Mining Company to recover possession of a portion of a silver mine. It also filed a bill on the equity side of the Court against the same defendant,

alleging ownership of the portions of the mine sought to be recovered in the action at law ; that defendant was in possession, working the mine and carrying away the ore; and praying an injunction pending the litigation, and that upon the hearing the injunction be made perpetual. A temporary injunction was issued. The defendant in these actions thereupon filed a cross-bill in the equity suit, alleging that the complainant in the original bill was, also, in possession of and working a portion of the mine in controversy, and praying an injunction which was also temporarily granted. The parties then waived a jury in the law case, and the law case was tried, and the bill and cross-bill in equity were heard at the same time during the March Term, 1877, upon the same evidence before Mr. Justice Field, Sawyer, Circuit Judge, and Hillyer, District Judge, the cases having been prepared and argued on both sides with consummate elaboration and ability. The Court found for the plaintiff in the law case, and gave judgment for the possession of the mine; and in the equity case a decree was entered for the complainant in the original bill, making the injunction perpetual, and a decree dismissing the cross-bill and dissolving the temporary injunction issued thereon and for costs. The decree of dismissal was absolute without any limitation or qualification. The case is reported in 4 Sawyer, 302, where the facts are fully stated. Both parties had drifts running in various directions through the lode or different levels. The Richmond Company took an appeal in the equity case, sued out a writ of error in the action at law, and gave the bonds necessary to operate as a supercedeas. After the appeal, the Eureka Company continued to work the mine, and extended its drift on one of its lower levels, so as to cut the body of ore found in what is known as the Potts Chamber, as indicated in the report of the case in 4 Sawyer, at page 304—being the body of ore which the Richmond Company was working at the time of the institution of the actions; but did not enter or take possession of, or interfere with any of the Richmond Company's shafts, winzes, or drifts. Thereupon, at the March Term, 1878, of the Circuit Court, the Richmond Company, upon affidavits

stating the appeal, *supersedeas*, and the acts of the Eureka Company in working the mine in the disputed territory, applied for an order restraining the further working of the mine pending the appeal. It was claimed, on the argument, that the working of the mine, although not a technical, was a substantial violation of the *supersedeas*; and that the Court, for the purpose of preserving the subject matter in dispute pending the litigation, should issue the order sought. Separate notices of the motion were given in the suit in equity and action at law. We will consider the equity case first. In this suit, upon the final hearing, the preliminary injunction was dissolved, and the cross-bill of the Richmond Company dismissed absolutely without limitation or qualification, the decree enrolled, and the term adjourned. An appeal to the Supreme Court was taken in proper time and form, to operate as a *supersedeas*; but there was nothing to supersede except the decree for costs. The Court granted no affirmative relief on the cross-bill. It simply denied the relief asked by the Richmond Company, and dismissed the bill out of court. The Eureka Company was not doing anything under or by virtue of the decree. It was not proceeding to collect the costs either by execution or otherwise. The case was ended in this court, the jurisdiction exhausted, and the term adjourned. There was no longer any case pending in the court in which any order could be made. The court, therefore, has no further jurisdiction in the case except to execute the decree for costs when the *supercedens* is removed, if it should be removed, or till the decree is reversed on appeal to the Supreme Court, and the cause thereby reopened upon the receipt of the mandate from the Appellate Court. To issue a restraining order, would be to exercise a new original jurisdiction without any suit pending in which it could be issued. The cases of *Galloway vs. The Mayor, etc., of London*, 3 De Gex, Smith and Jones, 60, and *Coleman vs. The Hudson River Bridge Company*, 5 Blatch. 56, are in point. The former case was a bill to restrain the corporation of London from taking certain property under statutory powers. The Master of the Rolls dismissed the bill, and the order of dis-

missal was affirmed on appeal, the Lords Justices differing in opinion. An appeal having been taken to the House of Lords, it being probable that the corporation would take the property, and pull down the building pending the appeal, the appellant applied to the Lords Justices for an injunction to restrain the corporation from proceeding till the appeal could be heard. Although the Lords Justices expressed themselves as being as willing as they ought to be to grant the injunction, it was denied on the ground that their jurisdiction was gone on the dismissal of the bill. Lord Justice Turner said: "I cannot but think that by reason of the dismissal of the bill, the power of the court is gone. I think that the plaintiff, if he intended to appeal to the House of Lords, ought, at the hearing, to have asked the court so to frame its order as to *keep alive its jurisdiction* pending the appeal." In *Coleman vs. Hudson River Bridge Company*, the judges of the Circuit Court not agreeing, certified a division of opinion to the Supreme Court. The justices of the Supreme Court were also equally divided in opinion on the questions certified. The consequence was a dismissal of the certificate of division by the Supreme Court. In the opinion dismissing the certificate the court suggest that the bill must be dismissed, and that the complainant could then appeal from the decree dismissing the bill. The defendant filed the mandate and moved to dismiss the bill; whereupon, the complainant's counsel asked the court to so modify the decree of dismissal, as to retain the provisional injunction until the decision of the Supreme Court on appeal from the decree of dismissal. It was argued that the injunction did not necessarily fall with a dismissal of the bill; or, if it did, *prima facie*, that it was in the power of the court to continue the injunction till the decision of the appeal. Mr. Justice Nelson, in delivering the opinion of the court, says: "The court cannot agree with either of these positions. The legal result of the division of opinion of the judges is a dismissal of the bill *without any qualification*. Indeed, the condition of the court renders any qualification or modification of the dismissal impracticable. The case is *out of Court*, so far as

it respects *any proceedings*, except an appeal to review the decree. The judges are disabled, from a contrariety of opinion, to annex any condition, and *it certainly requires no argument to show that in case of an unqualified dismissal of a bill, all incidents fall with it.* We agree that the Chancellor may, in his discretion, direct a modified dismissal, and thereby annex to it such conditions as may seem to him just and equitable. Having the possession and entire control of the cause, this qualified exercise of power is practicable. But such a case is very different from this one, where the dismissal is the result of law, and absolute; and where from the condition of the court no modification can be annexed. It was insisted that an appeal, when taken within the time and in the mode prescribed by the Acts of Congress of September, 24, 1789, (1 U.S. Stat. at Large 85, § 23,) and March 3, 1803, (2 Id., 244, § 2,) will operate under and by virtue of those Acts to continue the injunction. But it is quite clear that these provisions deal only with the writ of execution founded upon the decree rendered, and which is awarded by it, and have no application to the provisional writ of injunction, or other incidental proceedings in the progress of the cause." (5 Blatch. 58.)

This case is clearly an authority directly upon the point, that when a bill is dismissed without qualification, it is out of court; that all incidents go with it, and the jurisdiction is gone. The very object of the motion was to obtain a modification of the dismissal so as to avoid this result. Mr. Justice Nelson, also observes that the point was a subject of consideration in the Supreme Court, and that no doubt was entertained of it by any of the judges. It may, therefore, be regarded as the decision of the Supreme Court, and as settling the question. The conclusion is so obvious that the counsel in the last case, in their motion, proceeded upon the theory, that unless they could procure a modified decree to preserve the jurisdiction, the jurisdiction would be gone. The two cases cited are the only ones brought to our notice, or that we have been able to find, directly deciding the point. Occasions for continuing injunctions pending an appeal must

have been frequent and pressing; and the fact that no instance can be found in practice of their continuance where the bill has been dismissed absolutely, is the best evidence that court and bar have regarded the jurisdiction as gone.

Counsel for the Richmond Company relied upon two cases, *Goddard vs. Ordway*, 4 Otto, 672, and *Hart vs. The Mayor of Albany*, 3 Paige, 381, neither of which touches the point in this case. In the former case, there was a receiver; and at the time the *supersedeas* was perfected, the receiver had \$25,000 of the fund in his hands, which required an order of the court to enable him to pay it over to the defendant in pursuance of the decree; which order the court was asked to make. The Supreme Court say: "Such an order would be in *aid of the execution of the decree*, which has been stayed, and consequently beyond the power of the Court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would defeat its jurisdiction." There the fund was in court, in its custody and control. But in this case, there is nothing to stay except the collection of the costs. The court has no custody of the subject matter. There is no fund in court or under its control. In the case cited from Paige, the master out of court, upon an *ex parte* application, had granted a preliminary injunction restraining the defendant from destroying and removing his building. Upon the coming in of the answer, the defendant moved, on bill and answer, to dissolve the preliminary injunction, which motion was granted. An appeal was taken from the *order* dissolving the injunction. There was no dismissal of the bill; no final decree in the case. The appeal was from the *interlocutory order*. The case still remained in court, and the Chancellor had full authority to make any other order that the exigencies of the case demanded. In this condition of things, upon application, and upon terms, he made a new order restraining for a brief time the destruction of the property in controversy. He did not continue the former injunction, but, as he says in

terms, exercised a new and original jurisdiction in making the new order. That is not this case. Here the bill is dismissed absolutely, and the case is wholly out of court. There is no suit pending in which any order can be made. It follows that the motion in the suit in equity must be denied.

In the action at law, this court never had jurisdiction to issue an injunction. And it was for this reason that the bill in equity was filed. The court never had the custody of the subject matter. The *supersedeas* undoubtedly stays the issue of a writ of restitution and execution for costs. But none has been issued or asked for. The Eureka Company are doing nothing whatever by authority, or under, or in pursuance of the judgment, or of any process issued thereon. It is doing nothing more than it was doing before these actions were commenced, except that it has extended its drifts further into the mine, so as to work the body of ore which it was seeking by these same means to obtain, prior to the institution of any of these suits. It is simply doing what it was restrained from doing by the injunction issued on the cross-bill while it was in force. It is proceeding under the same claim and authority now, as it was before—nothing more, nothing less. The court has made no order in this case other than to enter judgment for the possession and costs in favor of the Eureka Company, and it can make none. Undoubtedly, if the court had inadvertently, or otherwise, issued an execution after the perfection of the *supersedeas*, and the plaintiff had been thus wrongfully put in possession, or was about to be so put in possession under the writ, it could by virtue of its control over its process have stayed the execution of the writ, or have restored the possession improperly given had the writ been executed. But nothing of the kind has occurred. Nothing in the custody or control of the court in this action is in any manner affected by the acts of the Eureka Company, and the court is without power to interfere. If there is any power to issue the restraining order asked, it lies with the Appellate Court. Whether that tribunal can make the order must be determined by itself. Under its rules, however, upon a proper showing

it can afford a speedy remedy by advancing the cause and bringing it to an early hearing. If deemed a proper case this would perhaps be the better remedy. While on the one hand, the working of the mine might consume the subject matter of litigation, and leave little for the Richmond Company in case of ultimate success; on the other, to restrain the working of the mine adjudged to belong to the Eureka Company for the period of three years—the time suggested as likely to be required for the disposition of the case—would be scarcely less calamitous should the decision be affirmed. To those familiar with the subject, it requires no argument to show that it would be extremely disastrous to allow an open mine with all its vast extent of shafts, drifts, winzes, etc., to fill with water, fall in, and become destroyed, and its machinery, hoisting works, mills and mine itself, to be disused for so long a period. Section 1,182 of the Statutes of Nevada, also relied on by the Richmond Company, relates to proceedings in a case pending over which the Court still has control. But this case is ended and gone beyond the reach of this Court. The statutory provision, therefore, has no application.

It follows, that the motions must be denied, and the order issued restraining the Eureka Company from working pending the motion vacated and dissolved, and it is so ordered.

March 22, 1878.

J. J. WILLIAMS, and CRITTENDEN THORNTON, for motion.

S. HEYDENFELDT, JOHN GARBER, and H. I. THORNTON,
contra.

Recent Decisions.

FICKLIN vs. TARVER ET AL.

[Supreme Court of Georgia. August Term, 1877.]

REMOVAL OF CAUSE TO FEDERAL COURT—PETITION AND BOND TENDERED—NO NOTICE.—Where, in a proper case an application is made in terms of the Act of Congress of March 3, 1875, for a removal of a cause, a sufficient petition and bond tendered by the applicant should be accepted, whether notice has been given to the opposite party or not. The act does not provide for notice, and none is necessary.

Petition from Baker Superior Court.

A citizen of Virginia, as sole complainant, had a bill pending in Baker Superior Court against several citizens of Georgia and a citizen of New York. The former had been served, the latter not. The amount involved was more than \$10,000. At the appearance term, after notice to counsel who represented one Georgia defendant only, the complainant petitioned, in terms of the Act of Congress of March 3, 1875, for the removal of the cause to the appropriate Circuit Court of the United States, filing for acceptance by the court the requisite bond and security according to the act. Objection was made on the part of the defendant, represented by counsel, that the other defendants had not been notified of the application. The court thereupon refused to consider and act upon the application until the other defendants were notified of it. Complainant excepted to this ruling.

R. N. Ely and D. A. Jason, for plaintiff in error, cited 6 Blatchf. 362; 47 Ga. 321; 49 Ib. 462.

BLECKLEY, J. (Abstract of Opinion.) For a very full presentation of the subject of removals, see Southern Law Review, vol. 2, p. 282, and vol. 3, p. 3, new series. The former article, by Judge Dillon, with some additions, has appeared in a separate pamphlet, under the title of "Removal of Causes from State Courts to Federal Courts." On page 67 of this pamphlet (note 107) it is said, "the adverse party is not entitled to notice of the time and place of presenting the petition," citing 8 Blatchf. 243, 247.

If notice was not required under former Acts of Congress, neither is it under the Act of 1875 (19 U. S. Statutes at Large, 470), for the mode of removal is substantially the same, so far as presenting the application to the State court is concerned, under all the acts.

Conkling (Treatise, 44*n*) thinks notice proper, upon principle, and says it can be acquired by rules of practice in the State courts. He adds that, according to the established practice of the courts of New York, notice must be given of *all* special motions in causes pending. After prescribing for filing the petition and bond, the language of the act is, "*it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit.*" There is not a word in the act about waiting for notice to be given. When the petition and bond are made and filed, the matter is ready for the court to act upon. If it is in the power of the State, by statute, rules of practice, or otherwise, to make notice a condition precedent, in addition to what the Act of Congress has prescribed, this State has not done so.

Where a statute plainly contemplates an *ex parte* order, notice is not absolutely a prerequisite, especially if means are afforded to contest the matter afterward. (5 Ga. 194.) The 5th section of the act we are considering makes provision for remanding the cause to the State court, if want of jurisdiction should be shown in the Federal court. (19 U. S. Statutes at Large, 472.) There is no occasion in the State court for a full hearing on the sufficiency of the surety. Such questions are constantly acted upon in the absence of the party for whose benefit the surety is taken. This is done in attachments, claims, appeals, injunctions, and other proceedings. Most generally, too, it is done by a mere ministerial officer. Surely it can be managed by the Superior court with as much safety to the absent party as by a Sheriff, a Clerk, or even by a Justice of the Peace.

The superior court should not have refused to entertain the application, nor have postponed action upon it, for want of notice to the defendants.

Judgment reversed.

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Current Topics.

IN *Estate of Selby* the Supreme Court affirms the order of the Probate Court. Selby died June 9th, 1875. Letters testamentary were issued July 12th, 1875. Notice was immediately given to creditors to present and prove their claims. The appellants presented their claim for \$107,826 87, and on the 30th of September it was approved by the Probate Judge. On the 21st of June, 1876, the estate paid ninety per cent. of the debts, the amount of which percentage paid to appellants was \$97,044 19. No interest had been claimed at this time. Sept. 4th, 1876, appellants filed their petition, the object of which was to show that by the terms of the sale of the certain ore mentioned in the claim, Selby was to pay interest after twenty days, and asking to amend their claim so as to be allowed interest. The Probate Court refused to allow interest on the claim.

The appellants relied upon *Est. of Hidden*, 23 Cal. 362.

Respondent cited C. C. P. 1493, 1917; 14 Cal. 171-3, claiming that appellants were concluded by their claim as presented and allowed.

IN *Farmers' Storage and Com. Co. vs. DeLappe*, recently decided by our Supreme Court, an interesting question arose concerning warehouse receipts. DeLappe, the defendant, sold certain wheat to Davis and delivered the wheat to the Farmers' Storage and Commission Co., the plaintiff in this action, and the company gave him a receipt for a certain number of pounds, payable to the order of Davis. DeLappe took the receipt to Davis and Davis paid him according to the number of pounds of wheat named in the receipt. It was soon ascertained that the secretary of the storage company

had made an error and issued the receipt for a greater number of pounds than had been actually received—an error in addition. Davis demanded all the wheat he had paid DeLappe for or its value, and the storage company paid him, and then brought suit against DeLappe to recover the amount paid Davis for the wheat not received.

The defendant claimed that if he was indebted to any one it was Davis, and not to the plaintiff, and that negotiations were pending between him and Davis looking to an arrangement of the difference, and that without his consent there could not be a change of creditors.

The court below gave judgment for the plaintiff, and the judgment was affirmed.

THE Supreme Court has just affirmed the judgment of the court below in *People vs. Thomasson*. The defendant stole a pig and was sentenced to the penitentiary for ten years, the full extent of the law. There was no legal proposition involved worthy of notice.

It is a noticeable fact that at nearly every term of the court criminal appeals are affirmed on the sole ground that counsel for defendants make no appearance nor file any briefs on behalf of their clients.

WE have the most thorough arrangement for procuring all the decisions of the Supreme Court sitting at Sacramento. We have procured the services of a lawyer whose long experience in such matters enables him to collate with precision and accuracy all that is interesting and of value concerning the late decisions and disposition of cases. As the court proceeds with its calendar our notes each week from Sacramento will prove of great interest to the bar.

IN *The People vs. Moore*, just decided by the Supreme Court, this most wholesome and proper principle is announced. Moore owned a certain interest in a mining claim which he contracted to transfer to Parrott. Two friends of Moore, Williams and Nash, also held interests in the same property. Moore represented to Parrott that the interest of Nash could be purchased for \$2,000 and that of Williams for \$3,000. Parrott advanced \$5,000 to Moore to be used in the purchase of

these interests. Moore obtained a deed of the property from Williams and Nash to himself and then deeded the same to Parrott. Parrott subsequently learned, and as the fact was, that Moore paid nothing to Williams and Nash for the deed, and kept the \$5,000. Moore was indicted for embezzlement.

The Attorney General argued that Moore was an agent for the purpose of acquiring the interests of Williams and Nash, and having falsely represented that \$5,000 was necessary for the purpose, and having received it for nothing, it was his duty to return the money; not having done so, he was guilty of embezzlement. Judgment affirmed holding Moore guilty.

OUR attorney at Sacramento has just handed down a memorandum showing the disposition of the following cases: 5765—*Zeimwaldt vs. Sac. City R. R. Co.*—Suit on notes executed by the President and Secretary of the railroad company by order of the Board of Directors, for work and labor done by the plaintiff as gardener in East Park, which park was owned by the defendant, and being at the terminus of the road, was improved by it for gain and to increase travel on their railroad. The defendant set up the plea of *ultra vires*. The court below gave judgment for plaintiff. Judgment affirmed. 5604—*Union Savings Bank vs. Nolan.*—Defendant executed a deed of trust of certain real estate to secure the payment of money. After failure to pay at the time stipulated, plaintiff brings suit in equity to have the deed of trust declared to be a mortgage and for a foreclosure thereof. Judgment for plaintiff below. Judgment affirmed. 5806—*Harris vs. Walker.*—Defendant promised payment to plaintiff for goods furnished a third party. Defendant claimed that instead of being an *original* promise it was simply a guaranty, and not being in writing, was void under the Statute of Frauds. The court below found it to be an original, as contra-distinguished from a *collateral* promise, and gave judgment for plaintiff. Judgment affirmed. 6016—*Snyder vs. Johnson.*—Argued and submitted. This case involves the construction of the Act of 1873-4, known as the Oakland Sewer Act. Plaintiff says the Act was mandatory and, therefore, unconstitutional. Defendant argued that the Act was simply permissive and not obnoxious to the decision in *People vs. Lynch*.

Supreme Court of California.

JANUARY TERM, 1878.

[No. 5,780.]

[Filed April 3, 1878.]

BARBER vs. BARNES.

COPARTNERSHIP — DISSOLUTION. — The seizure by attachment of the partnership property and the application of the property to the payment of creditors of the firm, and the fact that the firm did not do business after the attachment was levied, do not of themselves necessarily and conclusively operate as a dissolution of the partnership. The commencement of an action by the firm, subsequent to the attachment, to recover a debt due the firm, and the action not yet having been determined, tends to rebut any inference of the dissolution arising from the above facts.

The complaint was filed Oct. 6th, 1876, and alleges that on the 24th day of January, 1873, the plaintiff and defendant entered into copartnership under the firm name and style of Barnes & Barber, and that said copartnership has never been dissolved; that said copartnership was formed for the purpose of carrying on a box manufactory, and that the plaintiff advanced of his own individual money, for the purpose of material and the payment of an indebtedness of the copartnership, the sum of \$1,752 over and above the amount contributed by defendant, and that the defendant collected from persons indebted to the firm large sums of money, which were used by said defendant.

The plaintiff prays for a decree of dissolution and for an accounting. The defendant demurred to this complaint: 1. That the complaint does not state facts sufficient to constitute a cause of action. 2. The cause of action, if any, is barred by Section 339 of the Code of Civil Procedure.

The court below overruled this demurrer, and the defendant filed an answer denying all the allegations in the com-

plaint, and alleging that he had paid the sums of money in full to the plaintiff ; and for a further answer alleged that the said cause of action did not accrue to plaintiff within two years next before the commencement of this action, and the said action is barred by Section 339 of the Code of Civil Procedure. At the trial the plaintiff testified in his own behalf substantially to the allegations in the complaint, and that there is now a suit pending in this court against Hunt and Anderson, brought by defendant and himself, arising out of the partnership. Upon cross-examination he stated "That there was a suit brought against us by Wise and Bryte upon a note of the firm for \$2,500. I told Wise that the firm could not pay the note ; that the only way to save himself was to sue. Wise is my brother-in-law. I did not say anything to defendant about this conversation, because I knew he had no money to pay it."

"All the property of the firm was attached in the suit of Wise & Bryte against us. The suit was finally settled by the creditors meeting and appointing one of their number assignee, who collected all debts due the firm, which paid ninety cents."

The firm of Barnes & Barber did not do business after the attachment was levied.

The suit of Barber & Barnes against Hunt and Anderson was commenced on the 24th day of June, 1874.

The attachment in the suit of Wise & Bryte against Barber & Barnes was levied on the 5th day of May, 1874.

The defendant moved for a nonsuit upon the ground that the Statute of Limitations had run, and the action barred by Section 339 of the Code of Civil Procedure.

The court below granted the motion, from which order the plaintiff appealed.

L. S. Taylor attorney for plaintiff.

J. H. McKune attorney for defendant.

PER CURIAM.

The Court granted a nonsuit on the ground that the cause of action was barred by Section 339, Code of Civil Proced-

ure. The seizure of the partnership property under the attachment mentioned in the record, and the application of the property to the payment of the creditors of the firm, and the fact that the plaintiff and defendant "did not do business after the attachment was levied," did not, of themselves, necessarily and conclusively operate as a dissolution of the partnership. The commencement of the action by the plaintiff and defendant against Hunt & Anderson, to recover a debt alleged to be due to the firm—the action not yet having been determined—tends to rebut any inference of the dissolution of partnership, arising from the facts above stated. It is unnecessary to decide whether the statute will run as against a bill for an accounting from the time of the dissolution; nor if it does run, what section of the Code would be applicable to such a case.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

[No. 5,057.]

[Filed April 5, 1878.]

COX vs. McLAUGHLIN.

1. Where an express contract has not been fully performed, and an action upon an implied contract to pay the reasonable value of what has been done is maintainable, the express contract may ordinarily be introduced as evidence of value.
2. Where the plaintiffs sue for being prevented from performing a contract, the action is *on the contract*; and unless prevention is proved and found, plaintiffs are not entitled to recover anything on such contract.
3. Mere failure or refusal to pay an installment, as it becomes due, does not amount to prevention; and, therefore, does not authorize the party to abandon the work and recover the benefit he would have received had he fully performed. The fact that defendant failed to make such payments, "well knowing that plaintiffs had to rely on the money received from him," does not change the result.
4. But if the defendant knew at the time the contract was entered into, that plaintiffs relied entirely on his payments to them, or that such reliance was an inducement to the contract on their part, it might be otherwise.

6. So, if defendant had notified plaintiffs that he would pay none of the installments as they should become due, it might amount to prevention.

Appeal from Third Judicial District.

McAllisters & Bergin, J. P. Hoge, M. G. Cobb, John B. Felton for respondents.

Tully R. Wise, Campbell, Fox & Campbell, S. M. Wilson, S. W. Sanderson for appellants.

This is a judgment upon a re-hearing. The only question allowed and discussed was whether the acts of McLaughlin amounted to "prevention."

By the terms of the contract sued upon, the plaintiff was to receive \$900,000 for furnishing material and performing certain work, which was to be paid in installments. After about four-ninths of the work had been done, (so alleged by plaintiff), the defendant McLaughlin failed and refused to pay an installment when it became due. Thereupon the plaintiff abandoned the work and brought suit upon the contract to recover the value of work done and material furnished at the contract price—that is, for four-ninths of the contract price, \$900,000.

PER CURIAM.

[Impleaded with the Western Pacific Railroad Company.]

If after this cause shall have been remitted to the District Court the plaintiff shall ask, and the court shall permit an amendment of the complaint by the insertion of an averment of the actual value of the work done, it will remain for plaintiffs to *prove* the actual value.

Where a variance has occurred in the performance of a specific contract, under such circumstances as still enable a plaintiff to maintain an action on the implied promise to pay the reasonable value of the work actually done, and the contract, so far as it has been performed, has been performed *in accordance with the specifications* therein contained, the contract may ordinarily be introduced as evidence of value.

But whether, when the contract provides for an arbitrary and merely conventional standard of determining what work has been done, an appeal to which does not show what work has in fact been done, the contract is admissible as evidence of the actual value, is not a question, an answer to which is necessary to the determination of this appeal.

When the cause was here on the first appeal, this court held the contract between McLaughlin and Cox, Myers & Co. to be an *entire* contract, and said: "It is not alleged in the complaint that the work contracted to be performed has been completed, nor that its performance has been *prevented* by McLaughlin, or that the contract has been rescinded." (44 Cal. 27.)

After the cause was returned to the District Court, the plaintiffs, adopting the suggestion of this court, amended their complaint by inserting the averment, that defendants had "prevented" the completion of the work. There can be no doubt, as we intimated at the former hearing of this appeal, that the complaint, as amended, is an attempt to declare specially upon the contract part—performance and prevention.

The fact that it does not allege damages by reason of loss and profits on the whole job does not change the character of the pleading, nor of the proofs necessary to sustain it. Unless prevention was proved and found, the plaintiffs were not entitled to recover anything on the *contract*.

The *ninth* is simply a finding that defendant did not pay plaintiffs their money, as it became due. We have nothing to add to what we have already said in respect to this *finding*, except that the language that the defendant neglected and refused to pay, "well knowing that plaintiffs had to rely on the moneys received from him," adds nothing to its effect. Even if, under any circumstances the failure to pay would authorize the plaintiffs to cease work and bring suit on the contract, (the parties having omitted to insert a provision in the written contract that such failure should constitute prevention,) there is no finding that defendant knew, *at the time the contract was entered into*, that plaintiffs relied entirely on

his payments to them, or that such reliance was an inducement to the contract on their part. It is manifest that the motive which induced him to refuse or neglect payment cannot affect the rights of the parties under the contract.

There is no finding, in general terms, that defendant "prevented" plaintiffs from performing their contract fully. Nor is there any finding, or evidence tending to prove, that he *failed entirely*, or prevented, by notifying plaintiffs that he would pay none of the installments as they should become due.

We are, therefore, brought again to the question. In cases like the present, will the *mere* failure or refusal to pay an installment as it becomes due, authorize the other party to abandon the work, and yet to bring suit for recovery of all the benefit he would have received had he fully performed; that is to say—the contract price up to the time the work ceased, and such profits as he would have made, had he performed his contract in all respects?

An examination of the cases cited by plaintiffs' counsel has not satisfied us that such mere failure to pay has ever been held to be prevention.

In *Withers vs. Reynolds*, 2 Barn. and Ad. 882, Patterson, J., said: "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to defendant for delivering no more straw; but the plaintiff here expressly refused to pay for the loads as delivered." The case was commented on in *Franklin vs. Miller*, 4 Ad. and Ell. 599. Coleridge, J., there said: "In *Withers vs. Reynolds*, each load of straw was to be paid on delivery."

When the plaintiff said that he would not pay for his loads on delivery, that was a *total failure*, and defendant was no longer bound to deliver." (See note to *Cutter vs. Powell*, 2 Smith's Leading Cases.)

In *Masterton vs. Mayor of Brooklyn*, (7 Hill, 64, 65,) the plaintiff having continued to furnish marble, as required by his contract, up to a certain date, the defendants suspended operations upon the building, and refused to receive any more materials of the plaintiffs, though the latter were ready and offered to perform.

Canal Company vs. Gordon, (6 Wall. 561,) construes a statute of California in respect to mechanics' liens, and holds that where a contract is to complete a structure, with agreements for installment payments, a failure to make a payment at the time specified justifies an abandonment of the work, and entitles the contractor to receive a reasonable compensation for the work actually done.

In *Hale vs. Trout*, (35 Cal. 242,) there was prevention, or total refusal. Sawyer, J., said: "There was not merely a neglect of payment, but plaintiffs were notified by the defendants that they should treat the contract as at an end, and would receive no more lumber under it."

Cort vs. Ambergate Railway Company. This case is reported in Langdell's Select Cases on Contracts, 970. Lord Campbell said: "On the whole, we think we are justified on principle, and without trenching on any former decision, in holding that when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract."

Jones vs. Barkley (2 Douglass, 684,) and *Ripley vs. McClure* (4 Exchr. 344,) simply hold that where an act is covenanted to be performed by each of two parties at the same time, he who is ready and willing to perform may be discharged of performance by the other, and, if so discharged, may maintain his action on the contract.

None of the cases above referred to declare the proposition that failure to pay an installment on a contract of the kind here sued on will authorize an action like the present.

For the reasons mentioned in the former and present opinion, the judgment and order denying new trial are reversed, and the cause remanded for a new trial.

[WALLACE, C. J., and CROCKETT, J., did not participate in this decision.]

[No. 5,666.]

[Filed April 2, 1878.]

ESTATE OF FREY.

ADMINISTRATION—MISNOMER.—Where letters testamentary were directed to be issued to *Joseph Frey* they are unauthorized and void if issued to *Jacob Frey*, and being void he would not be entitled to commissions as executor.

WILLS—COMMON PROPERTY.—A testator has power to dispose of only one-half of the common property; the other survives to the wife, and she, by receiving letters testamentary, and claiming under the will, did not renounce her rights to one-half of the common property.

The letters testamentary issued to Jacob Frey were unauthorized and void, for the reason that the order directed letters to be issued to the petitioner, Joseph Frey.

The letters testamentary issued to Jacob Frey being void, he was not entitled to commissions, fees, or charges as an executor in the settlement of the estate of said testator. If the property in this case was common property, (on the argument it was so conceded), the testator had power to make a testamentary disposition of only one-half thereof, subject to the payment of debts, and the remaining half would vest in the surviving wife of the testator. The surviving wife, by applying for and receiving letters testamentary, and by claiming and taking under the will, will not be deemed to have renounced her right to the one-half of the property as common property.

Order reversed and cause remanded for further proceedings in accordance with this opinion.

District Court of the United States,

DISTRICT OF CALIFORNIA.

S. J. TRUMAN AND HENRY C. HYDE, ASSIGNEES, ETC.,

vs.

R. L. HARDIN.

Where a promissory note has been executed with a condition that the mules, the subject matter of the note, shall be delivered and vented when the note is paid, parol evidence is admissible to show the real nature of the transaction, and that said note was not paid notwithstanding the mules were delivered. The note is not a written contract *inter partes*, for it is signed only by one of them, and it would be ineffectual to establish, as against the vendor, the fact of sale.

HOFFMAN, J.

This was an action by the Assignees of Gilbert Horton, to recover the possession of certain mules alleged to have been the property of the bankrupt at the time of filing the petition. It is admitted that the mules were formerly the property of the defendant, and that an agreement for their sale was made between him and the bankrupt. The question is, was the sale an absolute one, or was it agreed that the right of ownership should remain in the vendor until the purchase moneys were paid? The only written evidence of the agreement is in the form of a promissory note by the vendee, which is as follows:

“ \$1,500.

POPE VALLEY, June 15, 1874.

“Twelve months after date, for twenty mules, I promise to pay Robert L. Hardin, or order, fifteen hundred dollars in U. S. gold coin, with interest from date till paid at the rate of one and a quarter per cent. per month. The said mules to be vented and delivered to said Horton when the said sum and interest is paid.

“ GILBERT HORTON.”

On the execution of this note the mules were delivered to Horton and remained in his possession, with the exception of some short intervals unnecessary to notice, until the bankruptcy.

A suit in replevin was subsequently brought by the defendant in this proceeding, and the bankrupt having interposed no defense the mules were delivered to the former by the Sheriff. The Assignee now sues to recover the possession or the value of the property.

It is contended on the part of the defendant that at the time of the sale it was distinctly understood and agreed that the mules should remain the property of the vendor until paid for.

The Assignee resists the introduction of parol testimony to establish this agreement, on the ground that it would alter or contradict the written instrument above set forth. But it will be observed that this instrument is merely a promissory note signed by the vendee alone. It does not purport to create any obligation on the part of the vendor. It indicates an executory agreement to pay for twenty unspecified mules when delivered—a certain sum on a certain day. But it would be unavailable to charge the vendor, because it is not signed by him as the statute of frauds requires. It is, therefore, in no sense a bill of sale or an agreement for a sale. It is merely an agreement to pay for certain property to be thereafter delivered. The mere production of this note with proof of the signature of the maker would of itself be ineffectual to establish as against the defendant the fact of sale. Parol proof would be necessary to show his acceptance of it, and the transaction which led to its execution. This parol proof, and not the note itself, would be the evidence to charge the vendor, and the note could then be received as evidence of the terms of sale, not as a written contract *inter partes*, for it is executed by only one of them, but as part of the *res gestæ*, and as showing the real nature of the transaction.

If then the proofs now offered were inconsistent with the transaction, as described by the note in relation to the price to be paid, the credit to be allowed or the number of mules

to be delivered, they would be disregarded, not because they contradicted the terms of the written contract of the parties, for they have made none, but because the note being in writing and made by one and accepted by the other would afford the more reliable evidence. But the parol proofs offered do not contradict or vary the agreement, as evidenced by the note.

It is proposed to show an express agreement that the title was to remain in the seller until payment of the price upon a fixed day. This is not only not contradictory to the note, but confirmatory of it, for the note provides in effect that the mules are not to be delivered or "vented," (that is, branded with the owner's sale mark,) until the price is paid. This agreement seems to have been waived, so far as the retention of possession by the seller was concerned, for the mules were delivered to the vendee. But the parol proofs show that the title was to remain in him, in accordance with the stipulation in the note with regard to "venting."

The parol proof and the terms of the note thus clearly establish what was the understanding of the parties, and bring the case within the rules governing conditional sales. Parsons, in his work on Contracts, observes: "But where the right to receive payment before delivery is waived by the seller and immediate possession is given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the purchaser." (1 Pars. on Con., 449; 2 Kent's Com., 495; *Putnam vs. Lamphier*, 36 Cal. 157.)

And it has been held that the vendor's title will prevail over that of the innocent, *bona fide* purchaser, for value from the vendee in possession. (*Kohler vs. Hayes*, 41 Cal. 455; *Wright vs. Solomon*, 19 Cal. 64; *Salters vs. Everett*, 20 Wend. 373.)

The Assignee in bankruptcy is certainly in no better position than an innocent purchaser for value. (See Benj. on Sales, Am. Ed., 2320 *in nota.*)

Judgment for defendant.

Recent Decisions.

WOOLEN vs. BANKER.

[United States Circuit Court, S. D. Ohio. 1877.]

CONSTITUTIONAL LAW—NOTE “GIVEN FOR A PATENT RIGHT”—DEFENSES—STATUTE. A statute of a state which provides that the words “given for a patent right,” written or printed on a note delivered upon a consideration in whole or in part for a patent right, shall subject the note in the hands of a purchaser or holder to the same defenses as are available against the original owner or holder, is unconstitutional and void.

The plaintiff brought his action upon a promissory note for \$500, containing the words, “given for a patent right.” Defense, failure of consideration in that the patent right was void for want of novelty and of no value; relying on the Statute of Ohio, passed May 4, 1869, § 66, O. L. 93, which provides that “any note the consideration for which shall consist in whole or in part of the right to make, use, or vend, any patent invention, or inventions claimed to be patented, shall have the words ‘given for a patent right’ prominently and legibly written or printed on the face of such note above the signature, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder.” The reply sets up that plaintiff’s intestate purchased the note for value, without notice before maturity. Upon the trial before Swing, J., and a jury, defendant offered evidence to show that when the note became due, and demand was made, he offered to return the patent right and cancel the obligation. Refused. Exception. Also, that the patent was void for want of novelty and of no value. Refused. Exception. An exception was also taken to the charge of the court because the jury was not instructed that defendant was entitled to the same defenses against plaintiff, although an innocent purchaser for value before maturity,

which he would have against the original payee. Verdict for plaintiff. Motion for a new trial was heard by Mr. Justice Swayne.

SWAYNE, J. (*Abstract of Opinion.*) That the Constitution of the United States has conferred upon Congress the power "To promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries" by § 8, Art. 1, is no more certain than that such power has been exercised by the enactment of patent laws, and that no State can limit, control, or even exercise the power. Congress has not only regulated the manner in which a patent may be obtained, but it has prescribed the manner in which it may be sold and conveyed, and has imposed penalties for the infringement thereof. The national government has, therefore, made a patent right property. The patentee has paid the government for the monopoly, and it is bound to protect him and his assignee in the use and enjoyment of it. Any interference whatever by any State that will impair the right to make, use, or vend any patented article, or the right to assign the patent or any part of it, is forbidden by the highest organic law. The statute in question is such an interference and is unconstitutional. *In re Robinson*, 2 Biss., 309; *Helm vs. Bank*, 43 Ind., 167; *Hereth vs. Bank*, 34 Ind., 380; *Hascall vs. Whitmore*, 19 Me., 102; *Smith vs. Hiscock*, 14 Ib.

Judgment entered on verdict. Leave to have cause certified to the Supreme Court refused.

United States Supreme Court Abstracts,

OCTOBER TERM.

MUNICIPAL BONDS.

1. *Bond with overdue coupons not dishonored paper so as to let in defense against bona fide holder.*—Where to a municipal bond which has several years to run, an overdue and unpaid coupon for interest is attached, that fact does not render the bond and the subsequently maturing coupons dishonored paper, so as to subject them, in the hands of a purchaser for value, to defenses good against the original holder. Judgment of Circuit Court of Iowa affirmed. *Cromwell, plaintiff in error, vs. County of Sac.* Opinion by FIELD, J.

2. *Bona fide purchaser for value takes free from all infirmities.*—A *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin; the only exceptions being where the paper is absolutely void for want of power in the maker to issue it, or where the circulation is prohibited by law for the illegality of the consideration. Municipal bonds payable to bearer are negotiable instruments and subject to the same rules as other negotiable paper. (*Murray vs. Lander*, 2 Wall.; *National Bank of North America vs. Kirby*, 108 Mass., 497.) Ib.

3. *Notice to purchaser from bona fide holder.*—A purchaser of a municipal bond from a *bona fide* holder who had obtained it for value before maturity, takes it equally freed as in the hands of such holder, though he may have had notice of infirmities in its origin. Ib.

4. *Purchaser at less than par value may recover.*—A purchaser of a negotiable security before maturity, unless personally chargeable with fraud in the purchase, can recover the full amount of the security against the maker, though he may have paid less than its par value, whatever may have

been its original infirmity. (*Stoddard vs. Kimball*, 6 *Cush.* 471; *Allaire vs. Hartshorne*, 1 *Zabr.* 665; *Williams vs. Smith*, 2 *Hill*, 301; *Chicopee Bank vs. Chapin*, 8 *Metc.* 40; *Lay vs. Wiseman*, 36 *Iowa*, 305.) Ib.

5. *Conflict of law—rules as to interest.*—When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern. (*Brannan vs. Hursell*, 112 *Mass.* 63; *Marietta Iron Works vs. Lottimer*, 25 *Ohio St.* 621; *Monnet vs. Sturges*, id. 384; *Kilgore vs. Powers*, 5 *Blackf.* 22; *Phinney vs. Baldwin*, 16 *Ill.* 108; *Etnyre vs. McDaniel*, 28 *id.* 201; *Spencer vs. Maxfield*, 16 *Wis.* 185; *Pruyn vs. Milwaukee*, 18 *id.* 367; *Kohler vs. Smith*, 2 *Cal.* 597; *McLane vs. Abrams*, 2 *Nev.* 199; *Hopkins vs. Crittenden*, 10 *Tex.* 189; *Keene vs. Keene*, 3 *C. B. [N. S.]* 144; *Morgan vs. Jones [Exch.]*, 20, *Eng. Law and Eq.* 454; *Pearce vs. Hennessey*, 10 *R. I.* 223; *Lash vs. Lambert*, 15 *Minn.* 416; *Searle vs. Adams*, 3 *Kan.* 515; *Kitchen vs. Branch Bank*, 14 *Ala.* 233; *Miller vs. Tiffany*, 1 *Wall.* 298; *Depeau vs. Humphreys*, 20 *Mart. [La.]* 1; *Chapman vs. Robertson*, 6 *Paige*, 627, 634; *Peck vs. Mayo*, 14 *Vt.* 33; *Hutters vs. Old*, 11 *Ia.* 1.) Ib.

6. *Judgment does not change rate of interest in Iowa.*—Municipal bonds in Iowa, drawing ten per cent. interest before maturity, draw the same interest, under the law of the State, after maturity, and coupons attached to such bonds draw six per cent. after maturity. Judgments in that State entered upon such bonds and coupons draw interest for the amount due on the bonds at the rate of ten per cent. a year, and upon the amount due upon the coupons at the rate of six per cent. a year. (*Hand vs. Armstrong*, 18 *Iowa*, 324; *Lucas vs. Pickle*, 20, *id.* 490.) Ib.

TAXATION.

Purchase under tax sale by party bound to pay taxes is but payment—what is voluntary payment—payment under mistake of law.—Plaintiff in error was trustee of a land company having a contract for the sale of lands in Kansas, which were illegally assessed. The company were, under the contract,

bound to pay all taxes on the lands. The illegal assessment not being paid, the lands were sold and bid in for the county. By the laws of Kansas, if lands sold for taxes are bid in for the county, the county treasurer is authorized to issue a tax certificate to any person who shall pay into the county treasury an amount equal to the cost of redemption at the time of payment. And if any lands sold for taxes are not redeemed within three years from the day of sale, the clerk of the county may execute a deed to the purchaser on the presentation to him of the certificate of sale. And if the assessment shall be discovered to be invalid, the amount paid on such sale shall be refunded to the purchaser on the return of the certificate, and also the amount of subsequent taxes and charges paid by him. In 1872 the plaintiff in error paid into the county treasury the sums due for taxes, interest, etc., on the said lands in Dickinson County, which had been sold for taxes, and received tax certificates therefor, without making any protest; not being aware at that time that the lands were exempt from taxation, but supposing that the taxes were legal and valid. After a decision in the case of *Railroad Company vs. Prescott*, the plaintiff offered to return the tax certificates to the county treasurer, and demanded a return of the money paid, which was refused; and suit was brought to recover the same. *Held:* (1) that plaintiff was not a purchaser of the lands, but his acquisition of the tax certificates was but a payment of the taxes; (2) that the payment was voluntary so as to defeat the action; (3) and that the mistake in paying the taxes was one of law, and not one of fact. Judgment of Circuit Court of Kansas affirmed. *Lamborn, plaintiff in error, vs. County Commissioners of Dickson.* Opinion by BRADLEY, J.

2. *Recovery on ground of mistake—must be mistake of fact.*—Mistake, in order to be a ground of recovery, must be a mistake of fact, and not of law. Such, at least, is the general rule. (3 Parsons on Contracts, 398; *Hunt vs. Rousmaniere*, 1 Pet. 15; *Bilbie vs. Lumley*, 2 East. 469; 2 Smith's Lead. Cas. 398; 6th ed., 458; notes to *Marriot vs. Hampton*.) A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view

of the law, cannot be revoked; and the money so paid cannot be recovered back. (*Clarke vs. Dutcher*, 9 Cowen, 674; *Ege vs. Koontz*, 8 Barr. 109; *Boston and Sandwich Glass Co. vs. Boston*, 4 Metc. 187; *Benson vs. Monroe*, 7 Cush. 125; *Milnes vs. Duncan*, 6 B. & C. 671; *Stewart vs. Stewart*, 6 Cl. & Fin. 968; and see cases cited in note to 2 Smith's Lead. Cas. 403-4; 6th ed. 466; *Marriot vs. Hampton*.) Ib.

Bankruptcy Decisions.

JURISDICTION.

If the assignee does not choose to become a party voluntarily, to a suit pending in the name of the bankrupt, the court in which such suit is pending has no power or authority to make him a party or to compel him to submit to its jurisdiction and control. Where the assignee intervenes at a proper time to defend a suit pending against the bankrupt, he has no right to demand a stay of proceedings; nor can he plead the final discharge in bar. The Bankrupt Act gives these privileges to the bankrupt alone. The jurisdiction of State courts over pending actions is not affected by the adjudication or discharge of a defendant, unless such adjudication or discharge is pleaded. An appellate tribunal will take cognizance only of matters appearing upon the record of the court below. A discharge obtained pending the appeal cannot be pleaded in the appellate court. Section 21 of the Bankrupt Act (Section 5,106, U. S. R. S.), does not apply to appellate tribunals. *Serra e Hijo vs. Hoffmann & Co.*, N. B. R. 124.

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Current Topics.

THE Constitutional Convention occupies the attention of all intelligent citizens deeply solicitous for a good State government. No class in the community is charged with more responsibility, and, at the same time, none will more enthusiastically respond to their obligations than the legal profession. Already able lawyers are advancing for public consideration original propositions of the gravest moment.

THE *Evening Bulletin*, of the 18th instant, contains two admirably written papers, both of which advocate very radical changes in the political organization of this State. One author confines himself to restriction of suffrage as the one remedy for evils supposed to exist. He would abolish universal suffrage and establish a property qualification. The other author maintains that the remedy lies in reducing the number of elective offices; that of State officers proper, only the Governor should be elected; that Judges hold for life; that the Legislature consist of one house only; that of county officers only Supervisors be elected, the remainder being appointed mainly by the Governor; and that of municipal officers, only Councilmen and Mayor be elected.

A "Plan of a Judicial System" comes before the bar of California, under the signature of Hon. Solomon Heydenfeldt. The pamphlet submits, without argument, to the profession a draft of an entirely new article for the future Constitution, to be entitled "The Judicial Department." It contemplates

one Supreme Court, three Courts of Appeal, County Courts, Justices' and Police Courts. The Supreme Court to consist of nine Justices, with jurisdiction in case of (1) Construction of Federal and State Constitutions; (2) Dissenting Opinion in Court of Appeals; (3) Overruling of a Prior Supreme Court Decision by Court of Appeals; and (4) Decision of one Court of Appeals conflicting with another. The County Court to have law, equity, probate, criminal, and special proceeding jurisdiction, and appellate jurisdiction from Justices' and Police Courts; no terms to be stated, but the Court always open for business. In counties where there are more than one County Court, the Legislature may prescribe to any one or more of said Courts a preference calendar for any particular class of cases.

The number of Justices of the Peace is to be prescribed by the Legislature, with jurisdiction to \$300, and in such cases of misdemeanor and special proceeding as shall be fixed by law.

The election of Judges to be by the people upon the nomination of two candidates by the Governor, confirmed by both Houses of the Legislature. When elected, the tenure of office for Supreme Judges is to be during good behavior, and for County Judges, six years.

Each Court of Appeals is to consist of three Supreme Judges assigned by the Governor.

The grounds of impeachment of Judges, and mode of procedure therein, conclude this plan of a judicial system. The document is a practical, lucid, and valuable acquisition to law literature, and reflects new lustre upon the distinguished honors acquired by Judge Heydenfeldt.

THERE is a widespread disposition to lay aside partisan feeling in the selection of members to the Convention.

THE appointment by the Governor of the Hon. James D. Thornton as Judge of the Twenty-third Judicial District Court has received universal approbation.

THE BANKRUPTCY LAW.—The Bankruptcy Law seems to

have grown unpopular. The Senate passed a bill, by a large majority, for its repeal. Similar action, beyond a doubt, will be taken upon it in the Lower House.

The present law is the third of its kind which has been adopted in the United States. One went into operation April 4, 1800; another on the 19th of August, 1841, and the one now existing on March 2, 1867. The first was repealed in less than three years, the second in less than two, from the date of its passage. Our present bankrupt act has stood its ground for eleven years. It has afforded an avenue of escape to a few fraudulent bankrupts from time to time, but has opened the door of freedom from the thrall of hopeless insolvency to myriads of honest but unfortunate debtors. Just why there should spring up such a revulsion of feeling against the law at this time is not very clear. The argument of fraudulent failures is equally applicable to the State law. If the costs of administering bankrupt estates appear in some cases excessive and unreasonable, the evil can be promptly remedied. An insolvent system should be national, and its operation co-extensive with that of the commercial system, which is wholly unconscious of State lines.

The New York merchants are understood to have been clamorous for repeal. When they come to realize the difficulty of collecting their dividends under the diverse systems of insolvency peculiar to the several States, and especially to suffer the costs and charges incident thereto, the "uniform system" of 1867 will be invested with beauty the half of which was not seen before.

A GREAT want of uniformity in the practice relating to the form of final process upon foreclosure of mortgage, and upon decrees for enforcement of other liens, induces us to offer a form appropriate in such cases. The Code of Civil Procedure, Section 684, providing generally for the enforcement of judgments, says: * * "When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the

sale and applying the proceeds in conformity therewith." The following form meets the requirements of the Code:

[*Title of Court and Cause.*] ORDER OF SALE.

The People of the State of California, to the Sheriff of the County of.....Greeting: Whereas, on the.....day of.....A. D. 18.., A. B. obtained a Judgment and Decree in the District Court of the....Judicial District, in and for the County of....., State aforesaid, against C. D., in an action wherein the said A. B. is plaintiff and the said C. D. defendant, which said Judgment and Decree was on the.....day of.....A. D. 18.., recorded in Judgment Book....of said Court, at page.., and the Roll filed and Judgment and Decree docketed in the Clerk's office thereof, and in, and by which said Judgment and Decree it is ordered, adjudged, and decreed that the Lands and Premises mentioned and described in the said Judgment and Decree be sold at public auction, as in said Judgment and Decree particularly set out.

Now, therefore, you, the said Sheriff, are hereby commanded and required to proceed to notice for sale, and to sell the premises described in said Judgment and Decree, a copy of which is hereto annexed and made a part hereof, and apply the proceeds of said sale as in said Judgment and Decree directed, and to make and file your report of such sale with the Clerk of this Court within....days from the date of your receipt hereof, and to do all things according to the terms and requirements of said Judgment and Decree, and the provisions of the Statute in such case made and provided.

Witness the Hon. E. F., Judge of the.....Judicial District of the State of California, in and for the County of....., this....day of...., A. D. 18..

Attest my hand and the seal of said Court, the day and year last above written.

G. H., Clerk, by I. J., Deputy Clerk.

Supreme Court of California.

APRIL TERM, 1878.

[No. 5,845.]

[Filed April 15, 1878.]

DELPHI SCHOOL DISTRICT vs. MURRAY.

FINDINGS.—That certain persons were “acting as trustees” of a school district, and that “there was no sufficient evidence of the election” of such persons, is merely a recital of evidence, and not a sufficient finding.

OFFICERS DE JURE.—The undisturbed exercise of public offices raises a presumption that the persons so acting are officers *de jure*. If the presumption is not overcome by opposing proof, the court should find that these persons are *de jure* officers.

EVIDENCE OF OFFICIAL CHARACTER.—An allegation that plaintiffs “are the duly elected, qualified and acting trustees,” in and for the Delphi School District, is sufficiently proven by evidence that they were *acting* as trustees, there being no opposing evidence.

This is an action for the condemnation of land to be used for school purposes. The court below rendered judgment for defendant on the ground, among others, that there was no sufficient evidence of the election of the persons claiming to be trustees of the district.

James A. Louttit, for appellant, cited *McCoy vs. Curtier*, 9 Wend. 17; *Potter vs. Luther*, 3 Johns. 431.

Terry, McKune & Terry, for respondent.

PER CURIAM.

1. The proceedings in this case amount to an action brought by Grupe and others, asserting themselves to be trustees for the *Delphi School District*, who sue in the name of the District, because authorized by the statute to do so. (Political Code, § 1,575.)

2. It is alleged in the complaint that Grupe and the others

"are the duly elected, qualified and acting trustees in and for said District;" and this allegation having been denied in the answer, it became the duty of the court below, sitting without a jury, to find the fact in that respect. This was not done, but instead a finding, so called, was made in the following words: "That C. Grupe, N. E. Alling, and R. P. Nason were acting as trustees for said school district, but there was no sufficient evidence of the election of C. Grupe, R. P. Nason, and N. E. Alling, or either of them, as trustees of the Delphi School District, of the County of San Joaquin, State of California; therefore the court finds that they were not *de jure* trustees, and neither of them was a trustee *de jure* of said school district at the time of the commencement of this action."

To find that these persons were "*acting as trustees*" was merely to embody the evidence, or a portion of it, adduced at the trial upon the issues just referred to, and to add that "*there was no sufficient evidence of the election of Grupe,*" etc., was merely to remark upon the condition of the case as presented. If it was proven at the trial that Grupe and others were "*acting as trustees*," a presumption thereby arose that these persons were officers *de jure*, but this presumption was, of course, disputable in its character, and might have been met and overcome by other evidence. (Code Civ. Pro. § 1,963, Subdv. 14.) If not so met and overcome the presumption would stand for proof and would support a finding that these persons were *de jure* trustees.

This was the rule at common law, and the statute has wrought no material change in that respect. That direct and primary proof of title to the office is dispensed with in such cases is mentioned by Mr. Greenleaf, as constituting an exception to the general rule excluding secondary evidence, and as proceeding upon "the strong presumption arising from the undisturbed exercise of a public office, that the appointment of it is valid," etc. (Vol. 1, §§ 91-2.)

Judgment reversed and cause remanded.

[No. 5,837.]

[Filed April 15, 1878.]

WEILL vs. JONES.

FORFEITURE—CONTRACT TO CONVEY.—A stipulation for re-entry by vendor in an agreement to convey, if default be made in any of the installments for the space of ninety days, constitutes an agreement that time should not be considered of the essence of the contract during the ninety days, and postpones any action founded upon vendee's default, until the expiration of that period.

WORDS—CONSTRUCTION OF.—The usual and proper sense of words will not apply in contracts where it is apparent that another sense was intended: *e. g.* to rescind construed in sense of to cancel.

The facts sufficiently appear in the opinion.

PER CURIAM.

The decision of this case depends upon the construction of a portion of one of the agreements annexed to the complaint, which reads as follows:

“If default shall be made in any of the above payments * * * * for the space of ninety days after the same shall become due, then it shall be lawful for the party of the first part * * * at his option and discretion, at once to *rescind this agreement* to convey, and to re-enter upon and repossess said premises * * * * and in such case all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment, and occupation of the premises by the party of the second part.”

The effect of a *rescission* would have been to restore the *status quo*; the party of the first part would have been entitled to the possession of the premises, the party of the second part to a restoration of the moneys he had paid.

It is apparent that the words “to rescind” are not employed in their usual or proper sense, because they are followed by a statement that the party of the first part shall *retain* the moneys paid. In its legal effect the stipulation is for the benefit of the party of the second part. If the stipulation were not in the agreement, the plaintiff would succeed

to the right to re-enter immediately on the failure of the second party to make a payment—subject, of course, to the right of the party of the second part to a specific performance, no inexcusable delay occurring. This right to specific performance might continue after the expiration of the period named, the only effect of the stipulation in respect to that matter being that it constituted an agreement that *time should not be considered of the essence* of the contract during the ninety days.

A provision that a party may at the end of ninety days after an event employ powers, which, except for the provision he could employ immediately on the happening of the event, means nothing, unless it means that he *shall not* employ them during the ninety days.

The present action was commenced less than ninety days after the default of defendant Jones. The plaintiff has obtained a decree restoring him to the possession of the land, and forfeiting to him the payments already made by the said defendant. Both these are consequences which the agreement provides shall *only* follow a failure to pay for ninety days after a payment shall become due.

Judgment reversed.

[No. 8,932.]

[Filed April 15, 1878.]

CROGHAN vs. MINOR & SPENCE.

FORECLOSURE—PARTIES.—Persons claiming title adversely to the mortgagor are not proper parties to a foreclosure suit, as they have no interest in the subject matter of the action.

All persons beneficially interested, either in the estate mortgaged or the demand secured, are proper parties.

Defendant Spence was impleaded as a subsequent incumbrancer. The court found in effect that Spence was claiming an adverse title not derived from or connected with the estate mortgaged.

PER CURIAM.

There is in the record no finding of the fact alleged in the complaint, but denied in the answer, that defendant Spence "has, or claims to have, some interest in, or claim upon said premises, or some part thereof, as purchaser, mortgagee, judgment creditor, pre-emption or homestead claimant, or otherwise, *which interests or claims are subsequent to and subject to the lien of the plaintiff's mortgage.*"

On the contrary, the court finds facts showing that the asserted claim of defendant Spence is not subject to the lien of plaintiff's mortgage, and that the alleged interest of said defendant is not derived from nor connected with the estate mortgaged, but is hostile to the claim of the mortgagor.

The object of a suit to foreclose a mortgage is to obtain the sale of the estate which the mortgagor held at the time he executed the mortgage, and the application of the proceeds of the sale to the payment of the demand for the security of which the mortgage was given.

All persons who are beneficially interested, either in the estate mortgaged or the demand secured, are proper parties to the suit. (*Burton vs. Lies*, 21 Cal. 87; *San Francisco vs. Lawton*, 18 Cal. 465.)

This rule will ordinarily embrace a mortgagor and mortgagees, and those who have acquired rights or interests under them, although prior incumbrancers, may be made parties for the purpose of liquidating their demands.

It is manifest that those claiming either legal or equitable estates adversely to that of the mortgagor are not proper parties to such a proceeding, as they have no interest in the subject matter of the action.

On the finding in respect to the claim or interest of defendant Spence, the court below should have dismissed the bill as to him.

Judgment reversed and cause remanded, with direction to the District Court to enter a decree against defendant Minor, in accordance with the prayer of the complaint, and to dismiss the action as to the other defendant.

[No. 10,342.]

[Filed April 11, 1878.]

PEOPLE vs. MCKELLER.

EVIDENCE—CROSS-EXAMINATION.—Witness stated upon cross-examination that he had lived in Marin County *two* years, such residence not having been brought out upon direct examination—*Held*: Evidence to contradict the witness in rebuttal, that he had testified on a former trial to a residence of *four* years in Marin County, was inadmissible.

The facts necessary to understand the decision appear in the opinion.

PER CURIAM.

The prisoner, in order to prove that he was not present in San Joaquin County at the commission of the burglary for which the indictment proceeds, produced a witness, Richard Carolan, who testified in substance that he had seen the prisoner at the corner of Third and Mission streets, in the city of San Francisco, on Sunday, April 22, 1877, between three o'clock and four o'clock P.M. It was conceded at the trial, that if the prisoner was present in San Francisco at the time mentioned by the witness Carolan, it was impossible for him to have been present at the scene of the burglary. The witness Carolan, upon his cross-examination by the counsel for the People, stated that he had lived in the city of San Francisco ever since 1855, except that he had been out of the city for the space of two years, working on a ranch in Marin County. He also stated that he had testified in this cause as a witness for the prisoner at a former trial. He was then asked by the counsel for the People if he did not testify at the former trial that he had lived in Marin County *four* years, or that he had been in that county *six or seven* years since the year 1855, and answered that he had not so testified. In their case in rebuttal the People, in order to contradict the witness upon this point, were permitted by the court, against the objections of the prisoner, to read to the jury a portion of the evidence given by the witness at a former trial, and

by which it was made to appear that he had, in point of fact, testified as claimed by the counsel for the prosecution, and had stated at the former trial that he had been absent from San Francisco, and in Marin County, some six or seven years since the year 1855.

In permitting the prosecution to contradict the witness on this point the court below erred.

The witness had testified in chief, that he had met the prisoner in San Francisco in the month of April, 1877. When, on his cross-examination, and in answer to questions put by the prosecution, he testified that he had first gone to live in San Francisco 'some twenty-two years before, and that since the year 1855 he had been in the county of Marin only two years, he testified to matters merely collateral in their character, and under the well settled rules concerning the production of evidence, the prosecution were bound by his answers.

"But it is a well settled rule," says Mr. Greenleaf, "that a witness *cannot be cross-examined as to any fact which is collateral and irrelevant to the issue merely for the purpose of contradicting him* by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question; but is conclusive against him." (1 Greenleaf Er. § 449.)

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

[No. 10,324.]

[Filed April 11, 1878.]

PEOPLE vs. METHRIM.

EVIDENCE—IMPEACHING WITNESS.—Opinion of witness' veracity based upon personal knowledge, as distinguished from general reputation, is incompetent.

The necessary facts appear in the opinion.

PER CURIAM.

The court below erred in permitting the question (against the objection of defendant's counsel), "From what you know of his reputation and *what you know of him*," (the witness sought to be impeached,) "would you believe him under oath in a matter in which he is interested?"

Assuming that the question was in other respects proper, it is clear that, in so far as it authorized the witness under examination to base belief on his personal knowledge—as distinguished from general reputation—the question was improper.

Judgment and order reversed, and cause remanded for a new trial.

[No. 10,331.]

[Filed April 11, 1878.]

PEOPLE vs. MORINO.

INSTRUCTIONS—REASONABLE DOUBT.—It is error to refuse instructions to jury as to reasonable doubt upon any fact essential to constitute the offense charged.

PER CURIAM.

The court below erred in refusing the instruction asked by defendant's counsel: "Before the jury can convict defendant they must be entirely satisfied, and beyond a reasonable doubt, that deceased, Gardiner, died from the effect of wounds inflicted by defendant, and did not die from any other cause."

In a criminal case the jury must be satisfied, beyond a reasonable doubt, that every fact essential to constitute the offense charged has been proved.

Judgment and order reversed, and cause remanded for a new trial.

[No. 10,340.]

[Filed April 11, 1878.]

PEOPLE vs. MAGGIE BROWN.

FAILURE OF DEFENDANT TO TESTIFY—EFFECT OF.

PER CURIAM.

The court erred in permitting the District Attorney (against the objection of defendant's counsel) to argue that the failure of defendant to become a witness was to be considered by the jury as a circumstance tending to prove her guilt, and in approving of such action of the prosecuting officer. (Penal Code, Sec. 1,323; *People vs. Tyler*, 36 Cal. 522.)

Judgment and order reversed, and cause remanded for a new trial.

Remittitur forthwith.

[No. 5,299.]

[Filed March 14, 1878.]

GREEN vs. CAMPBELL.

PLEADING.—A demurrer to a special defense was sustained, whereupon defendant offered to prove the matters set up in the special defense, under the general denial, which the court refused to allow. *Held*: Respondent cannot on appeal maintain that the sustaining of the demurrer worked no injury, because such defense might have been made under the general issue.

The facts of this case appear in No. 3 of this volume of the LAW JOURNAL, page 43. They are in brief as follows: Green, the respondent, delivered to a firm of merchants and factors certain wheat to be sold abroad for and on Green's account. The factors, having shipped the wheat to Europe on board Campbell's vessel, afterward became insolvent. Green demanded the wheat from Campbell, and, upon refusal, brought his action of trover.

Campbell, the appellant, set up as a special defense that

the factors were largely engaged in shipping wheat on their own account, and that he had no knowledge of ownership of the wheat in question by any person other than the factors.

The respondent demurred to this answer, which was sustained, and upon appeal the judgment was reversed. This was a petition for rehearing.

PER CURIAM.

The judgment was reversed here, because a demurrer interposed to the special defense had been sustained by the court below. The respondent, in a petition for a rehearing, now claims that this action of the court below was not of any moment, because the matter set up in the special defense might have been proved under the general issue pleaded in the answer.

It is not worth while, however, to consider this proposition now, because, even if the view of the respondent be correct, it appears by the record that the defendant offered at the trial, under the general issue pleaded, to prove the several matters set up in the special defense, but the evidence was excluded upon objection of the respondent.

Rehearing denied.

[No. 5,829.]

[Filed April 10, 1878.]

**IN THE MATTER OF THE ESTATE OF T. JEFF
WHITE, DECEASED.**

Deceased, White, died testate on the 12th day of April, 1877. In his last will and testament the appellant, Kate M. Bachman, was appointed sole executrix of the deceased, without bonds.

On the 13th day of August, 1877, upon the petition of Virginia R. Green, respondent, alleging youth, inexperience, and irresponsibility of the executrix, the Probate Court re-

voked the letters testamentary, previously granted, and from that order the executrix appealed.

A. J. King, for appellant, relied upon the absence of verification of the petition of respondent; upon the absence of evidence to sustain the order revoking letters, and upon the proposition that Sec. 1,396, Code Civ. Pro., only authorized the court to require bonds of an administrator named in the will, without bonds, in case of application for sale of real estate when good cause is shown.

Thompson & Ellis, for respondent.

PER CURIAM.

Sec. 1,396 of the Code of Civ. Pro. provides that when letters have been issued without bond, a bond may nevertheless be subsequently required, when it appears from any cause necessary or proper.

Sec. 1,401 provides that a sworn petition may be presented setting forth waste by the executor, and praying that he be required to give bond, and that, when such petition is filed, the powers of the executor may be suspended until the matter can be heard and determined. This section in no way conflicts with Section 1,396, which gives the Probate Court the general power to require a bond in proper cases.

Order affirmed.

Notes of Unwritten Decisions,

SUPREME COURT OF CALIFORNIA.

[No. 5,810.—Filed April 15, 1878.]

BURTON vs. ROBINSON.

Tenants in Common.—When the rule will not be applied that one tenant in common may recover possession of the whole of the demanded premises.

In vol. 51 Cal., page 186, is found a case entitled as above. The judgment therein was reversed and the court below directed to render judgment for one of the plaintiffs, Harry H. Burton.

Upon the remittitur being filed below, the court entered judgment in favor of H. H. B. for the possession of an undivided *one-third* of the premises.

Subsequently counsel for H. H. B. moved the court below to amend the judgment by inserting recovery of the whole instead of one-third of the demanded premises. The court denied the motion, and plaintiff took this appeal.

Appellant argued that as Harry H. Burton was a tenant in common he was entitled to possession of the whole tract as against every person other than his co-tenants, and that the decision in vol. 51 of the reports did not interfere with the rule.

Appellant also argued that the directions contained in the case in 51 Cal. were in effect that plaintiff, Harry H. Burton, should recover the whole.

Respondent argued that the decision in 51 Cal. (above referred to), was an adjudication, that by reason of the infancy of H. H. B. *his* rights were not barred by the Statute of Limitations, but that as to his co-tenants they had no standing in court, and that whatever title they may have had, the defendant's title, by virtue of the Statute of Limitations, was the better one, and they succeed as tenants in common with H. H. B.; that in such a case the rule that one tenant in common may recover the whole had no application. *Williams vs. Sutton*, 43 Cal. 73, and *Arrington vs. Liscomb*, 34 Cal. 370, were cited for respondent.

The judgment was affirmed.

Volney E. Howard & Son, for appellant.

Glassell, Chapman & Smith, for respondent.

No. 5,616.—**GLIDDEN ET AL vs. ROBINSON.**

Pleading—Foreign Judgment.—The action was brought on a judgment rendered in the State of New York; judgment

was given for the plaintiffs, and defendant appealed. Appellant claimed that one of the plaintiffs in the New York judgment being since deceased there was no sufficient allegation of jurisdiction in the Probate Court here as to his representations.

Judgment affirmed.

O'Conor & Pardow and Gould, for appellant.

Gray & Haven, for respondent.

No. 5,614.—BAKER vs. AVISE.

Action of Ejectment.—The defendant claiming that plaintiff was estopped by a former judgment, the court below gave judgment for defendant.

The case was affirmed.

Brunson, Eastman & Graves, for appellant.

Glassell, Chapman & Smith, for respondent.

No. 5,445.—MARQUARD vs. WHEELER.

Rehearing Denied.—The rule laid down in the opinion formerly delivered, to the effect that in the case stated the addition of "gold coin" to a verdict is surplusage, and that the court cannot reject such verdict and send the jurors out to find a new one, adhered to.

Geo. N. Williams, for appellant.

S. V. Smith, for respondent.

Recent Decisions.

TAXATION OF PERSONS RESIDING IN TWO PLACES.

Thayer vs. City of Boston.—Was an action decided recently in the Supreme Court of Massachusetts. The plaintiff had for many years been an inhabitant of Boston, had lived there in his own dwelling-house with his family, and paid taxes, and had an office for business. On account of the increase of taxation in 1870, he removed to the town of Lancaster, where he already had a summer residence, and thereafter remained there some months each year with his family, claiming to reside there, paying taxes, voting and holding office there. He, however, spent several months each year in Boston, which continued to be the principal place of his social and domestic life, and the place where the most of his family expenditures were made. In an action to recover back a tax for personal property, assessed upon and collected from him by the city of Boston, in 1876, held, that the question whether he was an inhabitant at that time of Boston or not, for the purposes of taxation, was for the jury.

While the choice of the tax-payer as between two places of residence is an element to be considered in determining his domicile, a choice in favor of one place will not control a preponderance of evidence in favor of another. In all disputed cases it is the duty of the court to submit each case to the jury, with instructions adapted to its peculiar aspects.

WHAT CONSTITUTES DOMICILE.

A late English decision on the same point is in substance as follows: In determining the question of a man's domicile, it is material to consider where his wife and family have their permanent residence. An intention expressed but not executed can not countervail existing facts. A testator, a native of Scotland, acquired a domicile in New South Wales, where he was possessed of a station called W., at which he,

for some time, resided. The portion of New South Wales in which W. was situated was afterward separated from the rest and made into an independent colony under the name of Queensland. Shortly before the separation the testator had ceased to reside permanently at W., and handed over the management of the station to his partner; but he was still part owner of the station, and frequently visited it, and had expressed an intention to reside there at a future time, and to be buried there. He was a member of the Legislative Assembly of Queensland, and took an active part in the political business of the colony, but had no permanent residence there. His wife and family lived at a house which he had built in New South Wales. He died suddenly while on a visit to the station at W., and was buried there. *Held* (affirming the judgment of the court below): that the testator was domiciled in New South Wales, not in Queensland. Privy Council, January 23, 1878. *Platt vs. Attorney-General of New South Wales*, 38 L. T. Rep. (N. S.) 74.

BILLS AND NOTES.

The Supreme Court of Pennsylvania has just passed upon two important points affecting the negotiability of promissory notes. A statute of Pennsylvania required that every note given for the right to make or sell a patented invention should contain the words, "given for a patent right," and made such note subject in the hands of any holder to the same defenses as if in the hands of the original holder, and provided a penalty for a violation of its requirements. It was held not in conflict with the provisions of the U. S. Constitution (Art. 1, § 8) as to patent rights.

But a note given for a patent right and not marked in accordance with the statute would be freed from the equities between the original parties in the hands of a *bona fide* holder for value and without notice.

EVICTION.

The Michigan Supreme Court has passed upon a vexed question of law, holding that the grantee in a warranty deed,

who has never been in possession actively or constructively, cannot maintain an action on the covenant on the ground that he has been evicted.

Parties—in action relating to Corporations—Stockholders.—Where any fraud has been perpetrated by the directors of a corporation, by which the property or interest of the stockholders is affected, the stockholders can come in as parties, and ask that their property shall be relieved from the effect of such fraud; but the question is raised whether they can so come in in a suit where there will be nothing left for the stockholders. U. S. Cir. Ct., Indiana, March 18, 1878. *Bayliss vs. Lafayette, Muncie, etc., R. R. Co.* (Ch. Leg. News.)

Bankruptcy—of Corporation—Duties of Directors.—1. The bankruptcy of a corporation does not put an end to the corporate existence, nor vacate the office of its directors. 2. After a chartered bank has been adjudicated a bankrupt, a member of its last active board of directors (the board in existence when the failure occurred and the act of bankruptcy was committed) cannot buy up claims against it at a discount, and entitle himself to credit therefor at full face value in settlement with creditors, on his personal liability as a stockholder. At least, this cannot be done so as to defeat the suit of a creditor who commenced his action before the bought up claims were actually applied in the extinguishment of the stockholder's personal liability, and while the stockholder held them, as transferee, open against the bank, he not having surrendered or canceled them until after the action was brought. Sup. Ct., Georgia, Feb. 19, 1878. *Holland vs. Heyman.*

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Current Topics.

UNLAWFUL DETAINER AMENDMENTS, CODE C. PRO. § 1161.—Two acts amending Section 1161 of the Code of Civil Procedure of this State were passed by the late Legislature. The first case in which the practitioner is called upon to act, in unlawful detainer, will probably be the occasion of some hesitation as to the exact status of the law on this subject as it now stands amended. The amendments will be found noted on page 179, *post*.

It would seem that both acts or amendments are in force, being the law of the land, and not being contradictory in any way; the most that can be said is that they are cumulative remedies. The one applies to a certain given state of facts covering the ground of the old law, as between landlord and tenant, and further providing that where covenants are broken and *cannot afterward be performed*, notice in writing need not be given—in all other cases requiring the notice as of old.

The other contains all the provisions of the first, and further provides that the successor in estate of the landlord shall have equal remedies with the original landlord; that is, modifying the common law rule that the conventional relation of landlord and tenant must exist in order to entitle the former to the summary remedy afforded by these enactments.

This act further affords a summary remedy against a tenant or subtenant assigning or subletting contrary to the covenants of the lease; again modifying the rule laid down under the common law, that such covenants only meant that the original tenant continued liable for rent, and could sub-

let or underlet notwithstanding covenants to the contrary.

The landlord may proceed under the one act, the subtenant or successor in interest of the landlord under the other, as the case may be, under a given state of facts. These amendments are to be construed as remedies afforded for different states of facts.

THE case of *The Mahoney Mining Company vs. Samuel Bennett* was decided on the 22d instant by Judge Lorenzo Sawyer, in the United States Circuit Court. The action is a contest between rival sets of stockholders, acting through their respective boards of directors, for the control of the mine. One board, representing as it is claimed a minority of the stock, and foreseeing the probability of the other board taking its place about the 1st of June, 1877, passed a resolution to lease the mine to Bennett for three years, with an option to purchase during the term at the price of \$250,000, and in pursuance of the resolution the lease was executed. This was a bill in chancery to set aside the lease and obtain an injunction.

The only question considered by the court was the *bona fide* character of the lease. The court found that one principal and avowed object of the lease was to keep the control from passing to the majority of the stockholders in case they should elect a new board at the meeting soon to be held; that Bennett was not the real lessee, but a mere instrument in the hands of the minority stockholders; and that he was a man not likely to take such a lease, having no sufficient means for such an undertaking, and not possessing experience in mining.

Upon this state of facts the court decided that the lease was made for an unlawful purpose—for the purpose of taking the mine out of the control of those who were to succeed in the management, and retaining it under the direction of a minority of the stockholders.

The court ordered a decree to be entered, canceling the lease in pursuance of the prayer of the bill, and making the preliminary injunction issued perpetual.

The defendant has given notice of appeal.

McAllister & Bergin, and Stewart, Van Clief & Herrin appeared for the complainant, and G. F. & W. H. Sharp, for the defendant.

THE United States Circuit Court upon a writ of error has affirmed the judgment of the District Court in the case of *Dickinson vs. Adams* to the effect as follows: To entitle an assignee to recover of the vendee goods sold on the eve of bankruptcy, it must be shown not only that the bankrupt intended to dispose of his property in fraud of the act, but that the defendant knew such to be his intention, and guiltily combined and colluded with him to carry it into effect.

The original opinion of Judge Hoffman will be found reported in full in 4 Sawyer (Ninth Circuit), 257.

A LEADING CASE, as we believe, will be that of the Estate of McCausland, deceased, just decided by the Supreme Court and opinion filed on the 20th instant. The contest arose in the Probate Court of Santa Clara County upon the application of Annie F. McCausland, claiming to be the widow, for a family allowance. The application was opposed by the heirs, on the grounds that the petitioner was never married to deceased; that her child was not the lawful issue of herself and deceased, and that her real name was Annie Forrester. A ceremonial marriage was not sought to be established at the trial, but the applicant claimed a marriage by repute and cohabitation and a contract *per verba de futuro cum copula*. As this appears to be the first application of that doctrine of the Scotch law in this State, and as there have of late, in the lower courts, arisen several cases involving the point, the estate of McCausland may be said to possess peculiar interest.

The court also in the same case passes upon the right of the petitioner to testify. It was contended that the application being "a claim or demand against the estate," the petitioner was excluded from being a witness. The court held that a family allowance petition is not an action or proceeding against an executor and that the applicant could testify. The case in its various phases was ably presented. We shall give a full report in our next issue.

Supreme Court of California.

APRIL TERM, 1878.

[No. 5,615.]

[Filed April 19, 1878.]

JAMES ET AL., APPELLANTS, VS. CENTER ET AL., RESPONDENTS.**DISMISSAL.**—Judgment of dismissal may be entered by the clerk notwithstanding cross complaint filed by defendant. C. C. P. § 581 construed.***APPEAL.**—An order vacating judgment of dismissal is appealable.

This action was brought to establish a trust. The defendants answered and filed cross complaints for quieting their title, which were duly answered by the plaintiffs. Before the trial the clerk, upon the application of the plaintiffs, entered a judgment dismissing the action. Defendants thereupon gave notice of a motion to vacate the judgment of dismissal and restore the cause to the calendar. This motion to vacate was subsequently abandoned, and instead an order to show cause was obtained. Upon the hearing the court below vacated the judgment of dismissal, from which order, being a special order, made after final judgment, the plaintiffs took an appeal.

Stetson & Houghton for appellants, McAllister & Bergin, being of counsel, argued that the dismissal was proper under C. C. P. § 581; that the defendants' pleading was a cross complaint and *not a counter claim*; and that upon a dismissal of the action the cross complaint and all go together, as parts of one action.

Philip G. Galpin for respondents. The conditions affixed by C. C. P. § 581, to dismissal, involve the exercise of judicial power in deciding whether a pleading is a counter claim or a cross complaint. The entry by the clerk, a ministerial officer, of such a judgment is an illegal act, citing *Stearns* vs.

* [But see the amendment in effect April 26, 1878, providing for dismissal by the plaintiff "if a counter claim has not been made, or affirmative relief sought by the cross complaint or answer."—EDITOR.]

Aguierre, 7 Cal. 449; *Kelly vs. Austin*, 17 Cal. 565; *People vs. Loewy*, 29 Cal. 265. He further contended that the cross complaints contained counter claims.

PER CURIAM.

The judgment of dismissal in form, entered by the clerk, was properly entered, inasmuch as no counter claim had been made (C. C. P. § 581.)

The matters set forth in the cross bills, so called, did not constitute a counter claim, because not arising out of the transaction set forth in the complaint and not connected with the subject of the action, (C. C. P. § 438, Sub. 1.)

The order appealed from was an order made after judgment, and therefore the subject of appeal.

The order setting aside the judgment was erroneous, because the plaintiff had the right to dismiss the action in the absence of a counter claim.

Order reversed.

[No. 5,785.]

[Filed February 19, 1878.]

REIDY ET AL., RESPONDENTS, VS. SCOTT, APPELLANT.

DEFAULT.—Where defendant erroneously believed he was served on the 26th of April, but in fact was served on the 25th and was one day too late with his answer—*Held*, upon an affidavit of merits and the answer filed showing a legal defense, the default should be set aside.

This case distinguished from *People vs. Rains*, 23 Cal. 129.

Samuel Scott was served by the sheriff in Merced County with a copy of summons and complaint, on the 25th of April, 1877. On the 7th of May, 1877, judgment by default was entered.

Defendant gave notice on July 7th, 1877, of motion to vacate the judgment, and filed his affidavit showing that he believed the summons was served on the 26th of April; that

his answer was in the hands of the clerk of the court before business hours on the morning of the day default was taken; and also that he had a good and perfect defense.

Bodley & Campbell and Chas. H. Marks, for appellant.
Terry, McKinne & Terry, for respondents.

PER CURIAM.

If the affidavit of merits is sufficient, we are satisfied that, under the views expressed in *Watson vs. S. F. and H. B. R. R. Company*, 41 Cal. 17, the court should have granted the motion to open the default. The answer, which was filed on the same day the default was entered, states facts which, if proved, would constitute a meritorious defense. The statements in the affidavit of defendant, that he is advised that he has a "good and perfect defense," and in the affidavit of his attorney that, in his opinion, defendant has a good defense, although in artificial averments of the fact that he has a defense on the merits, are to be referred to the answer actually filed. In *People vs. Rains* (23 Cal. 129), the affidavit of the defendant's attorney was to the effect that he had mistaken the day of service, and that he prepared a *demurrer* to the complaint. The court held that when the affidavit shows that the defense rests on matters appearing on the face of the complaint (by which, of course, is meant matters of defense), which, except for the interposition of a demurrer, would be deemed to be waived, the defense is merely of a technical character, and the affidavit is insufficient. But here an answer was prepared, and the advice of the attorney that defendant had a good and perfect defense was based on a *full and fair statement of all the facts of the case*. (See defendant's affidavit.) We think the default should have been set aside.

Judgment and order reversed, and cause remanded.

[No. 5,869.]

[Filed February 19, 1878.]

WANZER, RESPONDENT, VS. SOMERS, APPELLANT.

LIEU LANDS—CONTEST BETWEEN APPLICANTS.—At the time defendant filed his application in 1876 the Act under which he proceeded had been repealed. Plaintiff in 1875 filed upon the same land. In 1870 the Legislature passed an act to save the rights of purchasers under the repealed law: *Held*, that defendant's application, however defective, was made valid by the curative statute of March 24, 1870, and he is entitled to purchase the land from the State.

The land is claimed by both parties in lieu of school lands. The findings show a survey, approval of the survey, and on April 20, 1868, an application to purchase by defendant Somers, under Act of 1863, to the State Locating Agent, who accepted, and township plat was filed in the U. S. Land Office April 22, 1868. At this point in the proceedings the Act of April 27, 1863, page 591, and also the Act of 1858, page 248, relating to State Locating Agents, were repealed absolutely, without reference to pending applications, by Section 71 of the Act to provide for the management and sale of the lands belonging to the State, approved March 28, 1868, page 528. The repealing Act took effect May 28th, sixty days after. An entirely new system was provided for the public lands, under which defendant Somers' affidavits were insufficient.

The application and affidavits were filed with the Surveyor General June 12, 1868; defendant's location approved and certificate finally issued. All proceedings subsequent to June 12, 1868, appear to have been in conformity with the Act of March 28, 1868.

Plaintiff, Wanzer, on the 21st of December, 1875, filed his application to purchase, and on the next day filed with the Register his protest to issuance of a patent to defendant. The Register on May 3, 1876, referred the contest to the District Court for Los Angeles County, whereupon this action was commenced.

Defendant filed a general demurrer which was overruled, and the cause was tried resulting in a judgment for the plaintiff. Defendant appeals upon the judgment roll.

Thomas A. Brown, and John D. Bicknell, for appellant, relied upon the Act for the relief of purchasers of State lands, approved March 27, 1872, and an Act to legalize certain applications for the purchase of lands belonging to the State, approved March 24, 1870, and Political Code, § 3573.

Blanchard & Van Fleet and Howard & Hazard, for respondent.

PER CURIAM.

We shall assume that the acts of defendant looking toward the acquisition of title prior to June 12, 1868, when his application was filed in the Surveyor-General's Office, are not to be considered as in any way strengthening his claim.

But *that* application, however defective, was made valid and effectual by the curative statute of March 24, 1870. The plaintiff's application was not filed until after the last-named date. When, therefore, the defendant made application there were not "two or more applicants for the purchase of the same land or conflicts between claimants."

The defendant is therefore entitled to purchase the land from the State.

Judgment reversed and cause remanded, with directions to the court below to enter judgment for defendant.

[No. 5,792.]

[Filed April 19, 1878.]

SIMON, JACOBS & CO., RESPONDENTS,
vs.

SAMUEL SCOTT, APPELLANT.

PLEADING—HUSBAND AND WIFE.—Complaint against the husband alleging sale and delivery of goods to the wife is defective. The averment should charge sale and delivery to the defendant.

This action was commenced in the District Court of Mer-

ced County to recover the value of certain clothing, household goods, and supplies, alleged to have been sold and delivered to the wife of defendant Scott, and to have been necessary for the maintenance of the wife and family. The defendant demurred: 1st, that the facts stated did not constitute a cause of action; 2d, defect of parties defendant. The demurrer was overruled, and an answer filed denying the indebtedness, the value of the goods, or that they were necessaries. There was no denial of the sale and delivery.

The case was tried by the court, which found that the contract was made and the credit given to Mrs. Scott, the wife of defendant, and rendered judgment for the plaintiffs. Defendant appealed.

Thos. Bodley and W. P. Veuve, for appellant.
Terry, McKinne & Terry, for respondents.

PER CURIAM.

The complaint does not allege a sale and delivery of goods to defendant.

Whether defendant is liable for the goods furnished to the wife or not, it is certain that plaintiffs can not recover against him their value, in the absence of an averment that they were sold and delivered to him. If she was authorized by reason of her relation to her husband, the nature and character of the goods, and the husband's circumstances, to purchase them, the goods were in law sold to *defendant*, and the averment should have been to that effect. The averments in respect to furnishing the goods to the wife, etc., might have been omitted as mere evidence, and not the statement of ultimate facts.

The demurrer should have been sustained. Judgment reversed and cause remanded, with direction to the court below to sustain the demurrer to the complaint.

[No. 4,459.]

[Filed February 19, 1878.]

STOCKTON AND LINDEN GRAVEL ROAD CO.
RESPONDENT, VS.

STOCKTON AND COPPEROPOLIS R. R. COMPANY,
APPELLANT.

VERDICT — EXCESSIVE DAMAGES. — Where in an action for trespass the damages proven are nominal but the verdict is equal to the entire value of the property, the verdict will be set aside.

Appeal from Fifth Judicial District Court, San Joaquin County.

Action for damages to turnpike road by the building thereon of a railroad. The case was before the court on appeal, at April Term, 1873, and will be found reported in 45 Cal. 680.

Upon the trial there was some evidence that the value of the land was \$6,700, but the testimony was chiefly confined to the receipts for toll. The grounds of reversal will appear in the opinion.

W. L. Dudley and J. H. Budd, for appellant.

Terry & McKinne, for respondent.

PER CURIAM.

Upon the former appeal the decision here proceeded only upon the point that the plaintiff being a corporation *de facto*, should not have been nonsuited, because not showing itself to have been a corporation *de jure*.

Upon the return of the cause to the court below, a new trial was had, and resulted in a verdict for the plaintiff for some \$5,500.

The plaintiff would seem to have recovered the entire value of the land composing the bed of the road, for the disturbance of which the action was brought; while it is clear that the recovery should have been limited to the amount of the damages sustained by reason of the acts of the defendant,

which, as the case now appears in the record, are but nominal.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 5,885.]

[Filed February 19, 1878.]

C. A. FLANDERS, APPELLANT, vs. LOCKE, RESPONDENT.

CLAIM AND DELIVERY—TENDER.—Where plaintiff claimed drifted lumber and defendant disclaimed any charge for damages: *Held*, error to nonsuit the plaintiff for failure to tender payment of damage.

Appeal from Fifth Judicial District Court, San Joaquin County.

Action in claim and delivery.

In the fall of 1875, appellant and A. S. Bryant floated down the Mokelumne River from Amador County, a quantity of sugar-pine blocks and cedar posts of the alleged value of \$1,400, which lumber they owned and which lodged upon the banks of the river on the lands of respondent. Afterward, in the winter of 1876, respondent hauled the greater portion of this lumber from the banks of the river to his dwelling-house and split it up for cordwood. Appellant, as agent for Bryant and in his own behalf, demanded the lumber before respondent hauled it off. Respondent said that appellant could not move a stick of it. Appellant asked if it had done him any damage, and offered to pay any damages. Respondent said he didn't know that it had damaged him. Bryant assigned his claim to appellant, who brought his action of replevin.

The answer was a general denial. At the conclusion of plaintiff's evidence defendant moved for a nonsuit, which was granted, and from which an order denying a new trial this appeal is taken.

Terry, McKinne & Terry, for appellant.
Byers & Elliott, for respondent.

PER CURIAM.

The plaintiff was not a trespasser upon the land of the defendant, and as the latter had expressly disclaimed any damage, the plaintiff should not have been nonsuited for the failure to tender the amount of the supposed damage.

Judgment and order reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 5,886.]

[Filed February 19, 1878.]

FLANDERS, APPELLANT, vs. LOCKE, RESPONDENT.

CLAIM AND DELIVERY—EVIDENCE.—In action of claim and delivery it is sufficient for plaintiff to prove ownership, possession of defendant, demand, and refusal.

LUMBER DRIFTS—APPRAISERS.—Political Code, Sec. 2390, does not impose any duty upon either party as to appraisement. No intelligible mode is provided by the statute for the selection of appraisers.

Appeal from the Fifth Judicial District Court, County of San Joaquin.

Action of claim and delivery, the facts being analogous to those of the preceding case, except that the respondent refused to permit the removal of the property unless he was paid \$100. Appellant asked that referees be appointed, to which defendant replied: "No; I have set the damage myself, and I will not let the lumber go until I get it."

The court below, upon the evidence adduced by plaintiff, granted a nonsuit, and from an order refusing to grant a new trial this appeal was taken.

Terry, McKinne & Terry, for appellant.
Byers & Elliott, for respondent.

PER CURIAM.

It was not the duty of the plaintiff to prove as part of his case, that defendant did *not* suffer any damage. It was enough for him to show that the lumber was his, and in the possession of defendant, and that the latter refused to deliver it on demand.

If the defendant had any lien on the property by reason of damages sustained, it was for him to prove the damages.

The *claim* of the defendant that he was damaged in the sum of \$100 did not impose on plaintiff any duty with respect to the selection of appraisers, and this because no intelligible mode is provided by statute for the selection of appraisers.

Section 2,390 of the Political Code reads as follows:

"Whenever any lumber drifts upon any island in any of the waters of this State, or upon the bank of any such waters, the owner of the lumber may remove it upon the payment or tendering to the owner or occupant of the land the amount of the damages which he has sustained by reason thereof, and which may accrue in its removal; and if the parties cannot agree as to the amount of such damages, either party may have the same appraised by two disinterested citizens of the county, who may hear proofs and determine the same, at the expense of the owner of the lumber."

This section apparently attempts to give the party first moving the power to select his *own* judges for the determination of the controversy between himself and his less diligent opponent, and seems to make their judgment as to the amount of damages sustained conclusive upon him who has no voice in their appointment.

It is true it is provided that the citizens selected shall be "disinterested," but inasmuch as the most active of the parties is given the exclusive privilege of determining their disinterested character, this proviso hardly affords an efficient protection to him who has not been consulted in the selection of the arbitrators.

Judgment and order reversed, and cause remanded for a new trial.

[No. 5,675.]

[Filed April 19, 1878.]

LORENZ ET AL., RESPONDENTS, VS. JACOBS ET AL., APPELLANTS.

PARTITION—INTERLOCUTORY DECREE.—In an action under C. C. Pro., Sec. 752, for sale of property held in common, it is indispensable that the rights and interests of the respective parties be definitely ascertained in the interlocutory decree.

An interlocutory decree directing a sale, proceeds of which to await determination of rights in final decree, is error, for which a new trial will be awarded.

FINDINGS OF COURT.—The findings and conclusions of the court, upon which is based the interlocutory decree, can not cure the defects of the latter.

Appeal from the Ninth Judicial District Court, Trinity County.

This was an action for a sale under C. C. P., § 752, of a water ditch, known as the "Connor Ditch," used for mining, and the first right to the water of Connor Creek at a certain point, the plaintiffs alleging that themselves and defendants are tenants in common; that plaintiffs' interest is two undivided fifths held in equal undivided shares; that defendants' interests consist of the remainder, held jointly; that plaintiffs own no other real estate in common with defendants; and that the property is not capable of partition except through a sale.

The defendants answered raising various issues as to the relative interests and rights of the parties plaintiff and defendant.

The interlocutory decree mentioned in the opinion is as follows :

This case having been tried in open court, and the court being fully satisfied after a due consideration of the premises, and having filed conclusions of fact and law therein—

It is ordered, adjudged, and decreed that John W. Philbrook, John Martin, and M. F. Griffin be and they are hereby appointed referees to sell said property, to wit: [Description]. That the sale of said property by said referees be made for cash, in gold coin of the United States, at public

auction to the highest bidder, upon notice published and given in the manner required for the sale of real estate on execution, and that said notice state the time and terms of sale, and that all of said property be sold as one parcel, and that it shall be so stated in said notice of sale.

That after completing said sale the referees report the same to the court, with the name of the purchaser or purchasers, the price paid, and the terms and conditions of sale, and pay the proceeds into court to be distributed by final decree of this court. That said referees make such sale and file their report thereof in the office of the clerk of this court in Weaverville, before the first day of April, A. D. 1877, unless otherwise ordered by this court, in order that the said final decree may be made, fixing and setting the respective rights of the litigants and the costs herein, and distributing the proceeds of the said sale.

A. M. ROSEBOROUGH, Judge.

The defendants moved for a new trial on the ground among others that the findings, judgment, and interlocutory decree were against law. The court denied a new trial, to which defendants excepted and appealed.

Burch & Griffith and John G. Irwin, for appellants.

C. E. Williams, for respondents.

PER CURIAM.

Proceedings may be instituted by any of the co-tenants of real property, as provided in the Code of Civil Procedure (Section 752), for a partition thereof according to their respective rights, or for a sale thereof if it appear that the partition can not be made without great prejudice to the owners. But whether partition is to be ordered or a sale directed, it is indispensable that a decree, interlocutory in its character, be first entered, definitely ascertaining the rights and interests of the respective parties in the subject matter. In case a sale is to be directed, it is not impossible for any party, in the absence of such an interlocutory decree, to know whether he is interested in maintaining or in resisting the proceedings.

The interlocutory decree entered below in this case is entirely silent as to the quantity of interest of either of the parties to the proceedings, and is erroneous in that respect. It is true that the court has announced certain conclusions of law which, if they should be adhered to below, would go far to furnish the basis for such a decree; but the parties can not bring an appeal from these conclusions, but only from the interlocutory decree itself, which decree when properly entered will become conclusive of their respective rights unless such appeal be taken therefrom within sixty days from its entry in the minutes of the court. (Code of Civil Procedure, Section 939, Subdivision 3.)

Decree and order of denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.

Recent Decisions.

SURETY.

Prior to the commencement of the proceedings, the bankrupt sold his interest in a firm of which he was a member to E., his partner, at the same time agreeing to pay all the firm debts, and to indemnify E. against any liability thereon. *Held*, that as between themselves the bankrupt became the principal debtor, and E. surety for him as to all the debts of the firm, and that E. could not make proof for the respective difference between the total amount of the firm debts and the dividends which the estate will pay thereon as a contingent debt under Section 5068, when he has not paid any part of such differences. *In re John F. Phelps*, N. B. R. 144.

Abstract of the Amendments to the Civil Code

ENACTED AT THE

TWENTY-SECOND SESSION OF THE LEGISLATURE
OF CALIFORNIA, 1877-8.

[The dates indicate the time at which these amendments take effect.]

§ 40. Strike out all after "restoration to capacity." Provides that certificate of Superintendent Insane Asylum of discharge and of restoration to reason, shall be *prima facie* evidence of legal capacity. (May 29, 1878.)

§ 79 (N. S.) Provides for ceremony without license in favor of unmarried persons who have been cohabiting as man and wife. (February 6, 1878.)

§ 187. Adds to old section a provision for district court action by a deserted wife for maintenance without praying for divorce. (March 20, 1878.)

§ 300 (N. S.) Banking corporations without capital stock authorized to have a capital stock. Procedure prescribed. (May 28, 1878.)

§ 307. Provides for voting whole stock for each director, or giving one candidate as many votes as whole stock multiplied by number of directors shall equal. On same principle for as many directors as stockholder thinks fit. (April 2, 1878.)

§ 312. Ninth line read, "at the instance of absent, or any stockholders, or," etc. Third line from last, erase, "or majority vote," reading, "or no election had." (April 1, 1878.)

§ 315. In second line, strike out "or any proceedings thereof." Provides also that the notice be given "upon filing the petition." (April 1, 1878.)

§ 419, § 420. Technical provisions as to subscription and payment of capital stock of insurance corporations and companies. (April 1, 1878.)

§ 427. Investment of insurance funds to be as follows: (1) U. S. bonds. (2) State interest-paying bonds. (3) California county and municipal interest-paying bonds. (4) Real estate and warehouse receipts. (April 1, 1878.)

§ 429. Prescribes the amounts to be retained unimpaired before making dividends by corporations hereafter formed for fire, marine, and inland navigation insurance. (April 1, 1878.)

§ 431. Same as to life insurance companies. (April 1, 1878.)

§ 450. Provides that the forfeiture for issuance and delivery shall apply to the agent as well as to the principal. (April 1, 1878.)

§ 451. Prescribes that holder shall at any time be entitled to claim and recover a *surrender value* to be fixed in mode specified. (April 1, 1878.)

§ 452 (N. S.) Provides that when policy lapses by reason of non-payment of premium, the insurer must nevertheless continue it in force for adjustment in the mode indicated. (April 1, 1878.)

§ 471. Repealed. (April 1, 1878.)

§ 596. Add after "Odd Fellow," in second line, "Good Templars." (March 26, 1878.)

§ 602. Where any religious denomination, society, or church, needs management of property, the bishop, chief priest, or presiding elder may become a sole corporation by filing articles of incorporation verified by affidavit and proof of official character. The limitation of Section 595 not to apply to land held for churches, hospitals, schools, colleges, orphan asylums, parsonages, or cemeteries, when incorporation is made under this section. § 2. Corporations sole, heretofore organized, may elect to continue. Procedure indicated. (March 30, 1878.)

§ 1160. Adds a provision for the recording of certified transcript of letters patent in lieu of lost originals. (May 31, 1878.)

§ 1624. Adds "6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission." (May 8, 1878.)

§ 1917. Legal interest changed to seven per cent. (April 16, 1878.)

§ 2180. Adds that stage line may charge for over sixty pounds of luggage. (May 8, 1878.)

§ 2872. Insert after "imposed," "in some mode other than by a transfer in trust." (April 16, 1878.)

§ 2955. Seventh line read "surveyor," instead of "surgeon," and add: "Twelfth, the machinery, casks, pipes, tubs, and utensils used in the manufacture of wine, fruit brandy, and fruit syrup or sugar."

§ 2972 (N. S.) Lien of mortgage on a growing crop continues after severance so long as it remains on land of mortgagor. (April 1, 1878.)

§ 3051. Add, "and livery, or boarding, or feed-stable proprietors and persons pasturing horses or stock have liens dependent on possession for their compensation in caring for boarding or pasturing such horses or stock. (May 28, 1878.)

§ 3336. Add to first subdivision: "Or where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party and." (January 22, 1878.)

§ 3465. Erase the word "not" in fourth line. (April 26, 1878.)

AN ACT TO PROTECT STOCKHOLDERS AND PERSONS DEALING WITH CORPORATIONS IN THIS STATE, Provides that a false report by any superintendent, director, secretary, manager, agent, or other officer of a corporation, whose stock is listed at a Stock Board or Exchange, shall be a felony, punishable by imprisonment not exceeding two years, or by fine \$5,000, or by both. (Approved March 29, 1878.)

**AN ABSTRACT OF THE
Amendments to the Code of Civil Procedure,
ENACTED AT THE
TWENTY-SECOND SESSION OF THE LEGISLATURE
OF CALIFORNIA, 1877-8.**

[The dates indicate time at which these amendments take effect.]

§ 49. Six terms of Supreme Court, second Monday of January, April, May, July, October, and November. (October 1, 1878.)

§ 50. At San Francisco, January and July; Los Angeles, April and October; Sacramento, May and November. (October 1, 1878.)

§ 51. Traveling expenses of Supreme Justices to be paid. (Effect same.)

§ 113. Read "general" instead of "judicial" elections.

§ 259. Powers of Court Commissioners enlarged, authorizing them to take acknowledgments of deeds, etc., and have a seal. (March 9, 1878.)

§ 275. Any person having declared his or her intention to become a citizen entitled to practice law. (April 1, 1878.)

§ 279. Erase the words "white male" in the first line. (April 1, 1878.)

§ 325. Provides that claimant of title shall show payment of all taxes during the period of adverse possession. (May 31, 1878.)

§ 581. After fourth line, "not been made," insert "or affirmative relief sought by the cross complaint or answer of defendant." (April 26, 1878.)

§ 663 (N. S. Reconstructed.) "A motion for a new trial may be brought to a hearing in the county where the action is tried, or in an adjoining county, or by consent in any other county in the State." (May 8, 1878.)

§ 690, 2d subd. After bedstead insert: "Hanging pictures, oil paintings and drawings, drawn or painted by any member of the family, and family portraits and their necessary frames."

3d subd. Add: And seventy-five beehives and one horse and one vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business.

4th subd. Add: And all the indexes, abstracts, books, papers, maps, and office furniture of a searcher of records necessary to be used in his profession.

6th subd., after surgeon, read: Constable or minister of the gospel, in the legitimate practice of his profession or business, with food for such oxen, horses, or mules for one month.

10th subd., after debtor, erase, "made in any company incorporated under the laws of this State." (May 31, 1878.)

§ 895. Sixth line, read, "in excess of," instead of "equal to." (May 1, 1878.)

§ 926 (N. S.) Provides that deposit of gold coin equal to amount required in undertaking may be deposited in lieu of any required undertaking. (April 26, 1878.)

§ 969. Add to subdivision 8th, "granting" motion for a new trial; to 9th, "or refusing to confirm" appraiser's report. (May 8, 1878.)

§ 1161. Two bills amending this section appear to have been approved by the Governor on the same day. One is identical with the former amended section, with the exception of adding the following clause, "Provided, if the covenants and conditions of lease violated by the lessee can not afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant demanding the performance of the violated covenant or conditions of the lease."

[This amendment was intended to meet the difficulty which arose in the case of *Opera House vs. Bert*, reported in vol. 1, SAN FRANCISCO LAW JOURNAL, p. 161.]

The other is identical with the heretofore existing amended section (March 16th, 1876), with the following additions: Wherever the word landlord occurs, add, "or the successor in estate of his landlord, if any there be;" after the words property is held, in the fourth line, third paragraph, insert, "including any covenant not to assign or sublet;" and add as fourth paragraph the following, "Any tenant or subtenant assigning or subletting, or committing waste upon the demised premises, contrary to the covenants of his lease, thereby terminates the lease, and the landlord or his successor in estate shall, upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provisions of this Act." (April 1, 1878.)

§ 1166. Add, "except in cases when the publication of the summons is necessary, in which cases the court or judge thereof may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day fixed." (March 9, 1878.)

§ 1227. Read "court" instead of "judge." (February 25, 1878.)

§ 1230. Read "court" instead of "judge;" and in second line, instead of "he," read "the judge thereof." (February 25, 1878.)

§ 1232. Read "court" instead of "judge." (February 25, 1878.)

§ 1233. Last line, read "as from other judgments," etc. (February 25, 1878.)

§ 1254. Provides that after verdict and judgment, plaintiff may deposit the amount in court and obtain an order for possession of the property. Defendant may, on application, receive the money, being thereby held to waive all defenses except claim for further compensation.

The deposit in court to be at plaintiff's risk, and to be kept good against all contingencies. Applicable to pending actions. (April 1, 1878.)

§ 1257. Provides that motion for new trial or appeal shall not, after such payment and filing of the bond prescribed in § 1251, retard contemplated improvements. Applicable to pending actions. (April 1, 1878.)

§ 1276. Addendum authorizes change of name of any religious, benevolent, literary, or scientific corporation, by petition of trustees. (March 28, 1878.)

§ 1350. Add "as designated and provided for the grant of letters in cases of intestacy." (May 31, 1878.)

§ 1365. After "mentioned," third line, insert "the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof." (May 31, 1878.)

§ 1369. Renders a person incompetent to administer who is "not a bona fide resident of the State." (March 31, 1878.)

§ 1379. "Administration may, in the discretion of the court, be granted to one or more competent persons, although not entitled to the same, at the written request of the person entitled, filed in the court." (May 31, 1878.)

§ 2021. Add "6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause." (May 8, 1878.)

Terms of Court—Changes.

DISTRICT COURTS.

ALAMEDA, Third District, on third Monday of April and second Monday of August and December.

LASSEN, Twenty-first District, on third Monday of May, August, and November.

MODOC, Twenty-first District, on the first Monday of May, August, and November.

SAN FRANCISCO, Twenty-third District, on the third Monday of April, August, and December.

COUNTY COURTS.

LAKE, first Monday of February, May, August, and November.

MODOC, third Monday of February, April, June, August, and November.

SAN JOAQUIN, first Monday of March, April, July, and October.

SISKIYOU, first Monday of January, March, May, September, and November.

PROBATE COURTS.

Same as County Courts in ALL the counties.

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No. 10.

Current Topics.

IN our last issue we referred to the late decision of the Supreme Court in the Estate of McCausland, deceased, as constituting, in our opinion, a leading case in California on the subject of marriage. In this number we are able to report the case in full. The case was learnedly and ably contested both for and against the petitioner. We regret that our space does not admit of a report of the various authorities and exhaustive arguments presented by the respective counsel. It is the only reported decision of our Supreme Court where the civil law or Scotch doctrine of marriage *per verba de praesenti* or *de futuro* has been so broadly recognized.

THE Supreme Court has signalized its present sitting at Sacramento by an extraordinary performance of labor. For illustration, we may cite the last six working days in April. During that brief period the court acted upon no less than one hundred and fifty distinct cases, involving reversals, affirmances, written opinions, and the hearing of petitions, orders and arguments. This unexampled capacity for the execution of the multifarious and arduous duties of the bench can not but elicit the gratitude and commendation of litigants and lawyers. We are advised that a very small number of undecided cases now remain before the court. It is practically even with the calendar.

HON. R. F. MORRISON, Judge of the Fourth Judicial District Court, San Francisco, is accredited with the honor of rendering from the bench at the last law and motion day fifty-four orders in so many different causes.

THE Chinese Naturalization Question has been adjudicated by the U. S. Circuit Court for this circuit, Hon. Lorenzo Sawyer presiding. The opinion at this time is peculiarly interesting, inasmuch as it is believed that it will constitute an important factor in the argument on the Mongolian question now pending in Congress. The opinion is able and learned, and will be found a valuable document whether considered in a judicial, literary, or scientific point of view.

Supreme Court of California.

APRIL TERM, 1878.

[No. 4,989.]

[Filed April 20, 1878.]

IN THE MATTER OF THE ESTATE OF WM. McCausland, Deceased.

WITNESSES—PROBATE PROCEEDINGS, C. C. P. § 1880.—The third subdivision of Sec. 1880 of the Code of Civil Procedure provides that “Parties to an action or proceeding * * * against an executor or an administrator, upon a claim or demand against the estate of the deceased,” can not be witnesses. *Held*, an application for a family allowance is not within the statute, and the claimant is competent to testify.

MARRIAGE—EVIDENCE OF.—The doctrine recognized that marriage may be sufficiently established by evidence of a contract *per verba in presenti* and *per verba de futuro cum copula*.

From the Probate Court of Santa Clara County.

The facts of this case, as developed by the record, are as follows:

On the 4th of May, 1874, William McCausland died intestate in the City and County of San Francisco, leaving an estate estimated to be worth about \$40,000, situated partly in San Francisco and partly in Santa Clara County. Letters of administration upon his estate were issued by the Probate

Court of Santa Clara County, shortly after McCausland's death, to F. B. Smith, then Public Administrator of that county. Annie F. McCausland then filed a petition in the Probate Court, alleging that she was the widow of the deceased; that she was *enceinte*, and prayed for an order of the court allowing her a monthly allowance out of the estate for her support during administration. Subsequently, on the 19th of December, 1874, the petition was amended by inserting an allegation that since the filing of the original petition, petitioner had given birth to a child, the issue of herself and the deceased. The brothers and sisters of McCausland controverted the facts contained in the petition, denying that she was the widow of deceased, or that her child was legitimate. Upon the issues thus raised by the petition, and the answer of the heirs thereto, the case went to trial before the Hon. B. S. Payne, Probate Judge. The petitioner did not pretend that there had ever been a marriage celebrated between her and McCausland according to the California Marriage Act, but contended that there was a void contract of marriage, both *per verba in præsenti* and *per verba de futuro cum copula*, and that such a marriage was as valid and binding as if made *in facie ecclesiæ*. Counsel for petitioner contended that the Marriage Act of this State, as it existed before the Civil Code, and as now contained in it, was merely *directive*, and did not invalidate a marriage contracted *per verba de præsenti* or *per verba de futuro*, or in other words, "that the law with us in States where no change has been wrought by legislation is the same as established in Scotland," where only the consent of competent parties, and an assumption of the marital relations, and no form, is necessary for its solemnization. Counsel for the heirs maintained that the Code prescribed the law governing the marital relation; that the Scotch law was inapplicable, and that the relation existing between petitioner and deceased was illicit, and not matrimonial. The proof showed that the deceased became acquainted with petitioner in 1860, when she was only thirteen years of age; that he paid his addresses to her for several months, and then proposed marriage. That she first refused

on account of her age, and the supposed opposition of her sister; that she subsequently consented to become his wife, and thereupon commenced to cohabit with him. They lived together publicly for some time, when she abandoned him in consequence of his intemperate habits. Subsequently—about 1873—they again began to live together as man and wife, but under an assumed name, which was taken by McCausland's direction. During this time, however, they were known to some of their friends by the name of McCausland. They had several children, only one of which survives.

"It is sufficient to know," said Judge Payne, in an able opinion, contained in the transcript, "that all the elements of the marriage contract—such as mutual agreement, declarations, and cohabitation—have been proved in this case; and as the deceased was willing to recognize and treat her as his wife, and make her the mother of his children, so the next of kin must allow her to participate in his estate."

Campbell, Fox & Campbell, for the heirs and appellants.

J. E. McElrath, for respondent.

PER CURIAM.

The petitioner, who claims to be the widow of the deceased, upon the hearing of her petition for a family allowance, was permitted to testify in her own behalf, against the objection of the heirs. The third subdivision of Sec. 1880 of the Code of Civil Procedure provides that "Parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of the deceased," can not be witnesses. It is contended that this provision excludes the petitioner.

An application for a family allowance is not an action or proceeding against an executor or administrator. In this respect it is similar to an application for a partial or final distribution of the estate, or the payment of a legacy. The action or proceeding contemplated by the section referred to, is one which is adverse to the estate, by which some relief is sought, which will diminish or impair the estate. The

case stands, in this respect, as it would do were it conceded that the petitioner is the widow of the deceased, and were she offered as a witness to prove any other fact respecting the family allowance.

The words "claim or demand against the estate of the deceased," ought to receive the same interpretation as they do when found in the several provisions of the Code of Civil Procedure respecting the settlement of the estates of deceased persons. In that connection the words "claim" and "demand" are used synonymously. See Sections 1643, 1467, 1448, 1494, 1497, 1510. In *Fallon vs. Butler*, 21 Cal. 32, Mr. Chief Justice Field, in delivering the opinion of the court, said: "Whatever signification there may be attached to the word 'claim' standing by itself, it is evident that in the Probate Act it has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered." This definition, which in our opinion is correct, will not include a claim for a family allowance.

There was evidence tending to prove both a marriage in the present, and also a contract *per verba de futuro cum copula*. (1 Bish. on Marriage and Divorce, Sections 253, 443.) This is decisive on that issue, although the evidence was conflicting.

Orders affirmed. Remittitur forthwith.

[No. 5,989.]

[Filed April 19, 1878.]

PIERCE, APPELLANT, vs. FELTER ET AL., RESPONDENTS.

QUIET TITLE—QUALITY OF PLAINTIFF'S ESTATE.—Under C. C. Pro., Sec. 738, any person, the owner of *any estate or interest* less than a fee, or otherwise, can maintain an action for determination of an adverse claim.

Appeal from the Eighteenth Judicial District Court, San Bernardino County.

This was an action by a lessee of certain agricultural lands, for the determination of adverse claims of the defendants. The plaintiff alleged a leasehold estate for four years, expiring April 23, 1879; that Lytle Creek flows through the premises; that defendants adversely claim some interest in the premises, and in the use and flow of the water, and claim perpetual right to divert, etc., and conduct, etc., across the land to the exclusion of the riparian enjoyment; and that the claims are without foundation in law.

The court below was of the opinion that a mere adverse claim can not injure a tenant; that the injury is to the inheritance; that without an attempt to disturb the possession of the tenant the latter can not complain, as he is not damaged; and so holding the court granted a nonsuit, from which the plaintiff appealed.

H. C. Rolfe, for appellant.

Waters & Swing, and C. W. C. Rowell for respondents.

PER CURIAM.

The only question presented in this case is whether the owner of an estate or interest in land, less than an estate in fee, can maintain an action for the determination of an adverse claim made by another person. We think that he can. The Code of Civil Procedure (Section 738) provides, in terms, that an action may be brought by *any person* against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

We are unable to see any reason why the benefit of this statute, remedial in its character, should be confined to estates in fee, when the words employed by the Legislature embrace every interest or estate in lands, of which the law takes cognizance.

Judgment reversed and cause remanded for a new trial.

Remittitur forthwith.

[No. 5,425.]

[Filed, April 18, 1878-]

DYER, RESPONDENT, VS. BARSTOW ET AL., APPELLANTS.

STREET ASSESSMENT—PARTIES PLAINTIFF.—Where contract was made before and assessment after, the Act of 1870, p. 890—*Held*, the contractor could maintain the action. *Dyer vs. Pixley*, 44 Cal. 158, affirmed.

Appeal from Third Judicial District Court, San Francisco. This cause was before the Supreme Court on a former appeal, and is reported in 50 Cal. 652, when the principal point decided was that different assessments for improving the same street could not be united in one action. The plaintiff, Dyer, filed his amended complaint containing but one assessment and obtained a decree.

The defendants appealed.

M. A. Edmonds, for appellants.

J. C. Bates, for respondent.

PER CURIAM.

Dyer vs. Pixley, 44 Cal. 158, was an action by the contractor to recover a street assessment, under a contract entered into in the year 1869, the diagram, assessment, and warrant having been issued and recorded in July, 1870. The facts were precisely analogous to those involved in the present case, which is also an action by the contractor founded on a contract made in 1869, the diagram, assessment, and warrant having been issued in November, 1870. In each case the contract was made before and the assessment after the passage of the Act of April 4, 1870 (Statutes 1869-70, page 890). In the former case the point was made that the assessment having been made and issued *after* the passage of the Act of 1870, the action could not be maintained by the contractor but only by the City and County of San Francisco, as authorized by that Act. But the thirteenth section of that Act provides that the Act shall not be construed so as to “affect any contracts heretofore awarded or assessments issued.” In construing this clause we held its correct inter-

pretation to be that the Act should not be construed as "applicable" to previous contracts, or the remedies for their enforcement, and consequently that the contractor might maintain the action as though the Act of 1870 had never passed. We see no reason to doubt the correctness of this ruling and we think it is decisive of the present action.

Judgment affirmed. Remittitur forthwith.

[No. 5,796.]

[Filed April 18, 1878.]

D. N. HERSHY, APPELLANT,

vs.

BENJ. DENNIS, ET AL., RESPONDENTS.

FORECLOSURE—HOMESTEAD—DOCKETING DEFICIENCY—REDEMPTION—Where a mortgagor claimed a homestead, after which the creditor foreclosed, and deficiency was docketed: *Held*, no lien attached by virtue of the docketed judgment. The judgment creditor (for deficiency) was not entitled to redeem. The mortgagor or his grantee could redeem from the purchaser on payment of the sum bid and costs.

SHERIFF'S DEED—REDEMPTION.—Where a redemptioner makes a proper tender, the sheriff has no power to execute a deed to purchaser.

Appeal from the Sixth Judicial District, Yolo County.

This was an action under Section 738 of the Code of Civil Procedure to determine the adverse claim of defendants. The complaint alleges title in plaintiff, an adverse claim of defendant Dennis, and that defendants Diehl and wife are in possession as tenants of plaintiff. Dennis answered and filed a cross complaint denying the plaintiff's allegations, alleging title in himself and praying that his title be quieted.

In 1874 Diehl mortgaged first to Geary and Frazer, and also made a second mortgage to Barrett. In 1875, Diehl and wife filed their homestead declaration, after which a foreclosure of the first mortgage was commenced making Barrett, the second mortgagee, a defendant, who filed a cross com-

plaint for foreclosure of his second mortgage. On January 21, 1876, Barrett assigned to respondent, Dennis. In February, a decree of foreclosure was entered, directing the proceeds of sale to be applied, first to the Geary mortgage and secondly to the Barrett mortgage. Dennis became the purchaser at an amount which left a deficiency on the Barrett mortgage, of which he was an assignee, of \$1,287. For this balance a judgment was docketed in Barrett's favor against Diehl. *In May, Barrett paid Dennis the amount required to redeem, and received from Dennis a certificate of redemption.* On the same day Barrett assigned this certificate back to Dennis. In October, 1876, Diehl and wife granted the premises to Hershey, the appellant, and on the same day Hershey tendered the sheriff an amount sufficient to redeem, which was refused and thereafter the sheriff executed a deed to Dennis. The object of this action was to cancel the sheriff's deed.

Judgment below was rendered against Hershey, Diehl, and his wife, and in favor of Dennis for the possession of the land, and from an order denying a new trial the plaintiff appealed.

John W. Armstrong, for appellant; A. C. Freeman of counsel.

W. B. Treadwell, E. R. Bush and F. E. Baker, for respondents.

PER CURIAM.

Assuming, for the purposes of this case, that Barrett had a lien by virtue of the docketed deficiency arising from the mortgage sale, except for the homestead, it is plain that no such lien could attach after the declaration of homestead.

Barrett, therefore, occupied no such relation to the property or parties as authorized him to redeem from the purchaser at the mortgage sale; and Dennis, the purchaser, acquired no right as *redemptioner* by reason of a reassignment from Barrett.

It follows that the mortgagor or his grantee could redeem from Dennis on payment of the amount of his bid and costs,

etc. The plaintiff having tendered a sufficient sum to redeem, the sheriff had no power to execute a conveyance to the defendant Dennis.

Judgment and order reversed, and cause remanded for a new trial.

[Mr. Justice CROCKETT did not express an opinion in this case.]

[No. 4,964.]

[Filed, April 18, 1878.]

ROBINSON, TR., RESPONDENT, VS. GLEASON, APPELLANT.

PARTIES TO ACTIONS.—Where the answer discloses the fact that third persons have succeeded to defendant's interest, in whole or in part: *Held*, these persons must be made parties defendant as being necessary to a complete determination.

The necessary facts appear in the opinion.

R. M. Widney, for appellant.

_____, for respondent.

PER CURIAM.

Among the matters of defense the answer avers that after the purchase by the defendant from the plaintiff of the land in controversy, and prior to the commencement of the action, he, the defendant, sold portions of the land to Taylor, McCracken, Cummins, Lansour, and McDonald, ten acres to each, and the purchasers entered into possession, erected houses, and made other improvements on the land, and they or their assigns were at the commencement of the action, and still are, in the open and notorious possession thereof, of which the plaintiff had notice. The answer raises the point that these persons were necessary parties to the action, without whose presence a complete determination of the controversy can not be had. At the trial it was admitted that all averments of the answer in this particular were true, with the additional fact that the contracts of sale from the defend-

ant to Taylor and others were not of record at the time ^f of the commencement of the action, and that the plaintiff had no actual notice thereof; but that Northam and Martin, two of the beneficiaries of the trust, had such notice. It is contended on behalf of the plaintiff, that it was unnecessary to make these persons parties defendant, for the reason that their contracts of purchase were not of record at the commencement of the action, and that the plaintiff had no actual notice thereof. But Section 726 of the Code of Civil Procedure applies only to an action for the foreclosure of a mortgage, and Section 754 only to an action for partition. The present action is not within either of these categories, and these sections do not apply to it. The purchasers from the defendant, who had succeeded in his interest in and to the several tracts sold to them respectively, and who had entered into the possession and erected improvements thereon, could not be deprived of their interest or claim of title, nor be disturbed in the possession, without first having had their day in court; nor could there be a complete determination of the controversy in the absence of these parties. When the facts were brought to the attention of the plaintiff by the answer, it was his duty to amend his complaint and bring in these persons, and if he neglected to do so, the court of its own motion should have ordered it to be done, at the proper time, in order that the whole controversy might be settled in one action.

Judgment and order reversed, and cause remanded for a new trial.

[No. 5,852.]

[Filed April 20, 1878.]

PHIPPS, RESPONDENT, vs. HARLAN, ET AL., APPELLANTS.

FINDINGS.—Omission to find upon an affirmative defense set up in the answer is error.

Appeal from the Twentieth Judicial District, County of San Benito.

Action upon an administrator's bond to recover \$2,275 66, against E. Harlan as principal and Job Malsbury, William T. Brown, Charles D. Fowler, S. S. Swope, and Stephen Watson as sureties. The breach assigned was that upon final settlement of E. Harlan as administrator it was decreed that he pay the above amount to the guardian of the plaintiff, being plaintiff's distributive share as heir-at-law, and that he failed so to do.

The answer of all the defendants except Watson was confined to a denial of the filing of the bond, and of its execution, or that it was a bond. Watson separately answered, and the affirmative defense spoken of in the opinion was, that prior to the time when the alleged breach occurred he had filed his petition and obtained an order releasing him as bondsman.

The findings included every issue raised in the pleadings except that of the release of Watson. From an order denying a new trial all defendants appealed.

J. J. Harris, for Watson; and W. S. McPheeters and Jas. F. Breen, for the other appellants.

E. W. McGraw and J. J. May, for respondent.

PER CURIAM.

Judgment and order denying a new trial affirmed as to the defendants Harlan, Malsbury, Brown, Fowler and Swope. Remittitur forthwith.

The judgment as to the defendant, Watson, reversed for want of a finding upon the affirmative defense set up in his answer, and as to him the cause is remanded with directions to make an additional finding upon the said affirmative defense, and thereupon to proceed to judgment as to the said defendant Watson. Remittitur forthwith.

[No. 5,663.]

[Filed April 20, 1878.]

C. W. WENTWORTH AND D. H. OSBORN, RESPONDENTS,
VS.

HENRY MILLER AND CHARLES LUX, APPELLANTS.

CONTRACTS—CROPPING ON SHARES.—A lease contained a clause providing that possession of crops should remain with lessors until certain payments were made. While the payments were in default the lessee sold and delivered a portion of the crop. *Held*, the vendee acquired no title against the right of the lessors; the possession of lessee was as servants of the landlords, and in replevin the latter must prevail.

Appeal from the Twentieth Judicial District Court, San Benito County.

Action in trover by Wentworth and Osborn, as partners, against Miller and Lux, as partners, the complaint alleging that on the 3d of August, 1875, plaintiffs were owners and entitled to 400 sacks of wheat and about 300 sacks in the stack unthreshed, making a total of 88,200 pounds of wheat, worth \$1,499; also barley of 30,000 pounds weight in the stack unthreshed, worth \$450, which defendants took and converted. The answer denied that plaintiffs were partners or that they had complied with Art. 7, Ch. 2, Tit. 10 of the C. C. P. in relation to formation of partnerships, and denied the taking and conversion.

The findings were, that Miller and Lux being owners in fee made a lease to one A. J. Pool substantially as follows: Lessors to build a house, out houses, sheds, fences and corrals, seed, feed and implements; lessee to irrigate with water from the canal of the San Joaquin and King's River Canal Company, and to pay three-fourths of the price therefor, to yield and deliver when harvested one-fourth of all the crops as rent. The lease contained a clause that the possession of all said crops should remain with the lessors until the water bill, advances, and interest should be paid, and "if such payments shall not be made on or before the 1st day of August in each year the lessors shall be and are hereby irrevocably authorized to sell the same (the crops) with or with-

out notice." The lease was neither acknowledged nor recorded. On July 22d, 1875, Pool was indebted to Wentworth and Osborn upon a promissory note for \$900, and on that day he executed to them a bill of sale of 50,000 pounds of wheat, the consideration expressed being \$750, and this amount was to be credited upon the note. When the sale was made, Osborn, Pool and others were standing by the grain. Pool said to Osborn, "I deliver you this grain;" and Osborn with a piece of charcoal then marked the sacks. "W. & O." An agent of Osborn was left in charge watching the grain by day, and at night sleeping by them. On July 28th Miller and Lux, upon a settlement, took from Pool a bill of sale for his interest in the grain. Afterward, and when Miller and Lux became informed of the transaction with Wentworth and Osborn, they at once, and on the 4th of August, proceeded to the field where the grain was, took the same away from the agent in charge, and removed it to their warehouse.

The court gave judgment for the plaintiffs. Defendants appealed.

W. S. McPheeters, for appellants.

N. C. Briggs and J. J. May, for respondents.

PER CURIAM.

Whatever may be the character of the instrument recited in the findings and denominated a lease, it is clear that by the terms of the contract, the grain after it was cut was under the control of defendants, and in so far as it was in possession of the lessees, so called, was in their possession simply as servants of defendants.

The purchasers from the lessees acquired no other or greater interest in the grain than that of the parties named as lessees, and could assert no right to the possession as against the defendants.

Judgment and order reversed, and cause remanded.

Remittitur forthwith.

Circuit Court of the United States,

DISTRICT OF CALIFORNIA.

**IN THE MATTER OF AH YUP, APPLICATION FOR
NATURALIZATION.**

1. **NATURALIZATION — CHINESE.**—A native of China, of the Mongolian race, is not entitled to become a citizen of the United States under the Revised Statutes as amended in 1875. (Rev. Stat., Sec. 2169; Amendment Rev. Stat., p. 1435.)
2. A Mongolian is not a "white person" within the meaning of the term as used in the naturalization laws of the United States.

SAWYER, Circuit Judge.

Ah Yup, a native and citizen of the Empire of China, of the Mongolian race, presented a petition in writing, praying that he be permitted to make proof of the facts alleged, and upon satisfactory proof being made, and his taking the oath required in such cases, he be admitted as a citizen of the United States.

The petition stated all the qualifications required by the statute to entitle the petitioner to be naturalized, provided the statute authorizes the naturalization of a native of China of the Mongolian race. The petitioner was represented by B. S. Brooks, a counselor of this court. This being the first application made by a native Chinaman for naturalization, the members of the bar were requested by the court to make such suggestions as *amici curiae* as occurred to them upon either side of the question; whereupon S. Heydenfeldt, Jr., argued the case very fully in opposition to the application. Suggestions were also made by other members of the bar present.

The only question is, whether the statute authorizes the naturalization of a native of China of the Mongolian race.

In all the Acts of Congress relating to the naturalization of aliens, from that of April 14th, 1802, down to the Revised Statutes, the language has been "that any alien, *being a free*

white person, may be admitted to become a citizen," etc. After the adoption of the Thirteenth and Fourteenth Amendments to the National Constitution—the former prohibiting slavery, and the latter declaring who shall be citizens—Congress, in the Act of July 14th, 1870, amending the naturalization laws, added the following provision:

"That the naturalization laws are hereby extended to aliens of African nativity, and to persons of African descent." (16 Stat. 256, Sec. 7.)

Upon the revision of the statutes, the revisors, probably inadvertently, as Congress did not contemplate a change in the laws in force, omitted the words "white persons"—section 2165 of the Revised Statutes being the section conferring the right, reading: "An alien may be admitted to become a citizen," etc., etc. The provision relating to Africans of the Act of 1870, is carried into the Revised Statutes in a separate section, which reads as follows:

"The provisions of this title shall apply to aliens of African nativity and to persons of African descent." (Section 2169.) This section was amended by the "Act to correct errors and to supply omissions in the Revised Statutes of the United States," of February 18th, 1875, so as to read: "The provisions of this title shall apply to aliens, *being free white persons, and to aliens* of African nativity, and to persons of African descent." (Rev. Stats. p. 1435; 18 Stat. 318.) And so the statute now stands.

The questions are:

1. Is a person of the Mongolian race a "white person" within the meaning of the statute?
2. Do those provisions exclude all but white persons and persons of African nativity or African descent?

Words in a statute, other than technical terms, should be taken in their ordinary sense. The words "white person," as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these

words in this country, at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words a "white person" would intend a person of the Caucasian race.

In speaking of the various classifications of races, Webster in his dictionary says: "'The common classification is that of Blumenbach, who makes five. First, the Caucasian or *white* race, to which belong the greater part of the European nations and those of Western Asia; second, the Mongolian, or *yellow* race, occupying Tartary, China, Japan, etc.; third, the Ethiopian or *negro* [black] race, occupying all Africa, except the north; fourth, the American, or *red* race, containing the Indians of North and South America; and fifth, the Malay, or *brown* race, occupying the islands of the Indian Archipelago," etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of *complexion*, hair and skull. Linnæus makes four divisions, founded on the *color of the skin*: 'First, European, *whitish*; second, American, *coppery*; third, Asiatic, *tawny*; and fourth, African, *black*.' Cuvier makes three: Caucasian, Mongol, and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race. (See *New American Cyclopedia*, title "Ethnology.")

Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words "white person" used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. I am not aware that the term "white person," as used in the statutes as they have stood from 1802 till the late revision, was ever sup-

posed to include a Mongolian. While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that Congress intended to include in the term "white person" any other than an individual of the Caucasian race, I do find much in the proceedings of Congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolians. At the time of the amendment, in 1870, extending the naturalization laws to the African race, Mr. Sumner made repeated and strenuous efforts to strike the word "white" from the naturalization laws, or to accomplish the same object by other language. It was opposed on the sole ground that the effect would be to authorize the admission of Chinese to citizenship. Every Senator, who spoke upon the subject, assumed that they were then excluded by the term "white person," and that the amendment would admit them, and the amendment was advocated on the one hand, and opposed on the other, upon that single idea. Senator Morton, in the course of the discussion said: "This amendment involves the whole Chinese problem. * * * * The country has just awakened to the question, and to the enormous magnitude of the question, involving a possible immigration of many millions; involving another civilization—involving labor problems that no intellect can solve without study and time. Are you now prepared to settle the Chinese problem, thus in advance inviting that immigration?" (*Congressional Globe*, Part 6, 1869-70, p. 5122.) Senator Sumner replied: "Senators undertake to disturb us in our judgment by reminding us of the possibility of large numbers swarming from China; but the answer to all this is very obvious and very simple. If the Chinese come here, they will come for citizenship, or merely for labor. If they come for citizenship, then in this desire do they give a pledge of loyalty to our institutions, and where is the peril in such vows? They are peaceful and industrious; how can their citizenship be the occasion of solicitude?" (Ib. 5155.)

Many other Senators spoke pro and con on the question, this being the point of the contest, and there being fair ex-

amples of the opposing opinions. (Ib. pages 5121 to 5177.)

It was finally defeated, and the amendment cited, extending the right of naturalization to the African only, was adopted. It is clear, from these proceedings, that Congress retained the word "white" in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization. Again, when it was found that the term "white person" had been omitted in the Revised Statutes, it was restored by the Act passed "to correct errors and to supply omissions" in the Revised Statutes before cited. Upon reporting this bill, Mr. Poland, Chairman of the Committee, explained the various amendments correcting errors, and upon the amendment to insert the words "being free white persons," said: "The original naturalization laws only extended to free white persons." * * * A very few years since [in 1870] Mr. Sumner, of Massachusetts, then in the Senate, moved to strike out the word "white" from the naturalization laws, and it was objected to on the ground that that would authorize the naturalization of that class of Asiatic immigrants that are so plentiful on the Pacific Coast. After considerable debate, instead of striking out the word "white," it was provided that the naturalization laws should extend to Africans and persons of African descent. After explaining the omission in the Revised Statutes, he adds: "The member of our Committee who had this chapter on the naturalization laws to examine as a sub-Committee, failed to notice this change in the law, or it would have been brought before the House when the revision was adopted." (*Congressional Record*, Vol. 3, Part 2, Session 1875, p. 1081.)

Upon this report the amendment was made as it now stands in the statute. Thus, whatever latitudinarian construction might otherwise be given to the term "white person," it is entirely clear that Congress intended by this legislation to exclude Mongolians from the right of naturalization. I am, therefore, of the opinion that a native of China, of the Mongolian race, is not a white person within the meaning of the Act of Congress.

The second question is answered in the discussion of the

first. The amendment is intended to limit the operation of the provision as it then stood in the Revised Statutes. It would have been more appropriately inserted in Section 2165, than where it is found in Section 2169. But the purpose is clear. It was certainly intended to have some operation, or it would not have been adopted. The purpose undoubtedly was to restore the law to the condition in which it stood before the revision, and to exclude the Chinese. It was intended to exclude some classes, and as all white aliens and those of the African race are entitled to naturalization under other words, it is difficult to perceive whom it could exclude unless it be the Chinese.

It follows that the petition must be denied, and it is so ordered.

April 29th, 1878.

B. S. Brooks, for petitioner. S. Heydenfeldt, Jr., *amicus curiae*, opposing.

Bond—of United States Revenue Collector—Sureties not Liable to Private Individuals for Tort of Collector.—A United States Revenue Collector and his securities are not liable in a suit upon the bond of the Collector for a tort or injury committed by one of the deputies of the Collector upon the property of the plaintiff. Such bond is for the indemnity of the United States alone, not for private individuals injured by wrongs and torts of the Collector and deputies. The Collector might be proceeded against under Section 3169 of the Revised Statutes (U. S.) Sup. Ct., Georgia, Feb. 19, 1878. *Clarke vs. United States.*

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No. 11.

Current Topics.

AN example, which ought not to be followed in California, occurs in the near approaching election of Supreme Court Judges in Tennessee. A Democratic Convention will assemble at Nashville on the 29th instant, whose nominations, as it has been decided by the party leaders, will include candidates for the Supreme Bench, the highest and most sacred office in the catalogue. This course indicates that the ultimate court is to bear the taint of political bias. A political judiciary is one of the grandest curses that can afflict the body politic. It is a towering evil, alike opposed to the sober judgment of all fair minded citizens; to the spirit of the Constitution, which prescribes a total separation of the judicial from every other department of government; to the supposed progress of the times in wisdom and conservatism; to the very life of the inestimable doctrine of *Stare Decisis*; to the maintenance of a high standard of learning and efficiency at the bar; to public confidence in the established civil and political relations of the community; and finally, to the peace and perpetuity of the republic itself. When political conventions fill judicial offices, it means that the last resort of the injured citizen shall be naught but the abode of a dominant political bias; of unenlightened judgment adhering by force of habit, if not by influence of corruption, to partisan maxims, which, by necessity, must tend to ostracize advocate and client of unwelcome political tenets, and promote the side that sustains the recognized party affiliations.

THE repeal of the Bankrupt Law has become a question

concerning the best time to put the repeal into effect. The Judiciary Committee reported in favor of the 1st of January next; the argument used being that the next Congress will then have been in session a sufficient time to mature a new bankruptcy system. A compromise was made by the adoption of September 1st as the time when the repeal shall take effect (and the bill so amended now goes back to the House).

Supreme Court of California.

APRIL TERM, 1878.

[No. 5,981.]

[Filed April 22, 1878.]

KELLEY, RESPONDENT, vs. MCKIBBEN, APPELLANT.*

FINDINGS.—The findings, in an action for the recovery of personal property, should contain a description thereof. A finding referring to the complaint for description, when it appears that the amended complaint was intended, is irregular.

JUDGMENT.—A judgment is invalid for uncertainty where it refers to the findings for certain *data*, and the findings in turn refer to the pleadings, from which it can not be intelligibly ascertained what is meant.

Appeal from the Fourth Judicial District, San Francisco.
Action in claim and delivery for household furniture, consisting of bed-room sets, chairs, carpets, etc., specifically described in the complaint, alleged to be worth \$1,000, seized by McKibben on the 22d of November, 1875. McKibben justified under an execution from the Justices' Court against one Morgan, placed in his hands as sheriff, and denied ownership of Kelley.

The findings recite that Kelley on the 22d of November was the owner, etc., of all the goods mentioned in the complaint,

* A petition for rehearing in this case was filed by respondent, May 6th, 1878.

except the following articles therein enumerated to-wit:
[Describing a portion.]

Defendant appealed on the judgment roll and the order denying defendant's motion to retax the costs.

Mogan & Sullivan, for appellant.

Daniel T. Sullivan, for respondent.

PER CURIAM.

The judgment recites that the case having been submitted for decision, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith. It then proceeds as follows: "Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that Luke C. Kelley, plaintiff, do have and recover from William McKibben, defendant, judgment for the return of said property *mentioned therein*, or if such return can not be had, then for damages, etc."

The most favorable view for the plaintiff is that the property "mentioned therein" is the property mentioned in the findings, mentioned in the recitals by which the judgment is preceded. Upon reference to the findings, however, it appears that no property is actually mentioned there except certain property of which the plaintiff is found *not to be the owner*. The property which is found to belong to plaintiff is not mentioned at all in the finding, but is stated therein to be the property "*mentioned in the complaint*." Upon looking into the *complaint*, no intelligible description of the property is found there.

It may be proven that the reference to the *complaint* is mistaken, and that the *amended complaint* is really intended. But this will be found not to relieve the difficulty, for though the amended complaint contains an enumeration of the articles of personal property sued for, it is manifest from the findings, already referred to, that several of them are found not to be the property of the plaintiff, and yet the excepted articles can not be selected with any degree of certainty from the list enumerated in the amended complaint.

In short, the judgment is uncertain in itself, and the reference by which it is attempted to be supported does not make it certain.

The conclusion to which we have arrived upon this point, renders the decision of the question upon the taxation of costs below unnecessary.

Judgment reversed and cause remanded.

Neither Mr. Justice MCKINSTRY nor Mr. Justice RHODES expressed an opinion.

[No. 5,561.]

[Filed April 20, 1878.]

AMBROSE, APPELLANT, vs. McDONALD, RESPONDENT.

ATTORNEYS AND COUNSELORS—COMPROMISING CLAIM.—A client employed an attorney to bring suit. The attorney compromised the debt before suit at fifty cents on the dollar, and failed to account to his client—*Held*, the settlement was no defense to an action for the full amount claimed.*

Appeal from the Twelfth Judicial District, San Francisco. This was an action to recover \$643 claimed from McDonald on the purchase and sale of 20 shares of Overman stock and 20 shares of Chollar-Potosi, during September, 1874. The answer admitted the transaction, mentioned the complaint, but set up a counter claim for a subsequent operation in Silver Hill stock, and for further affirmative defense relied upon a *full accounting and settlement*, and payment of all sums found due thereon.

The court below found that on the 1st of December, 1874, McDonald had an accounting of the matter in controversy with one Morgan, at that time attorney of Ambrose, and paid to Morgan \$311 in full of all demands; that the plaintiff, Ambrose, had engaged the services of Morgan as an attorney to collect the money, restricting his employment to the bringing of suit by writing to that effect; that about the

* As to compromises after suit commenced, *vide Preston vs. Hull*, 50 Cal. 43; *Holmes vs. Rogers*, 13 Cal. 191; and *Sampson vs. Ohleyer*, 22 Cal. 210.

time of employing him, plaintiff introduced Morgan to defendant as his lawyer, but said nothing about the extent of his authority. Thereafter Morgan wrote a letter to defendant demanding a settlement, which resulted in the payment above mentioned of \$311, being about half the amount claimed. The court further found, that Morgan retained the money and left the country. As conclusion of law the court was of the opinion that plaintiff, having placed Morgan in a position of trust and confidence towards McDonald by introducing him as his attorney, was bound by the settlement, and rendered judgment accordingly. From an order denying a new trial the plaintiff appealed.

Daniel Titus, for appellant.

Bartlett & Pratt, for respondent.

PER CURIAM.

The court finds that Morgan was employed by plaintiff as an *attorney* to collect the money due from defendant to him, and that plaintiff restricted his employment to the bringing of a suit against defendant to recover such money.

There is no evidence nor finding of fact that Morgan was represented by the plaintiff as having any relation to him except as his "lawyer." As attorney-at-law he had no authority, actual or ostensible, to compromise the claim or receive any money thereon until after suit brought. (C. C. P. 283.)

Judgment and order reversed and cause remanded for a new trial.

[No. 5,491.]

[Filed April 20, 1878.]

SHAFTER, APPELLANT, vs. EVANS, RESPONDENT.

EVIDENCE—EXPERTS.—When the facts from which negligence is sought to be inferred are within the experience of all men of common education, the opinions of experts are inadmissible. It is for the jury to draw the inference of negligence.

Appeal from the Seventh Judicial District, Marin County.

Action to recover \$725 damages for the destruction of thirty-five young cattle. Defendant's corral—about an acre of land—was situated upon the border of the Pacific Ocean, in Marin County, bounded on three sides by a fence, and upon the other side by a bluff forty feet high over the ocean beach. Defendant, wishing to drive up from pasture about 250 head of his own cattle, found intermixed a number of the plaintiff's. For the purpose of separating them he drove the whole into the corral, the separation to be made the following day. During the night, by reason of some unexplained cause, eighty head went over the bluff and were killed, including twenty-nine head belonging to plaintiff. There was no other corral on the tract.

Upon the trial the defendant was allowed to introduce, against plaintiff's objection, several witnesses to testify as to their opinion concerning the safety of the corral.

The court below (Temple, J.) was of opinion that there was negligence in leaving the cattle over night without a guard, but that the negligence was in a degree less than gross negligence, and a jury having been waived, rendered judgment for defendant.

From an order denying a new trial, the plaintiff appealed.

J. McM. Shafter, for appellant.

T. H. Hanson, for respondent.

PER CURIAM.

The ultimate question in issue at the trial was whether it was actionable negligence in the testator of these respondents to cause the cattle of the plaintiff to be driven into the corral, under the *circumstances* alleged. When those circumstances were established by proof, the ultimate fact of negligence on the one hand, or ordinary care upon the other, was a matter to be *inferred* by the jury. The ultimate fact of negligence in such a case is not one to be established by the mere opinion of witnesses called to testify. The evidence of experts is not admissible. A clear expression of this principle is found in *New England Glass Company vs. Lovell* (7 *Cush. R.* 321), where Chief Justice Shaw observes as fol-

lows: "In applying circumstantial evidence which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two distinct duties to perform: First, to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends upon experience. When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference."

These views were subsequently adopted and applied in the case of *White vs. Ballou* (8 Allen R. 408), where the general question was one of negligence in kindling a fire under certain circumstances appearing in proof.

For these reasons we are of opinion that the evidence of the witness Parsons and others, testifying to their opinion of the safety of the corral, was inadmissible, and should have been excluded.

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

[No. 5,606.]

[Filed, April 22, 1878.]

CHRISTIE, RESPONDENT, vs. CHRISTIE, APPELLANT.

DIVORCE—EVIDENCE.—Example of evidence held insufficient to support a decree of divorce on the grounds of desertion, cruelty, and neglect to provide.

PRACTICE—APPEAL.—Appellant having offered no evidence in his defense at the trial, took an appeal from the order denying a nonsuit, and an appeal, also, from the judgment. The plaintiff's evidence was held, on appeal, insufficient to support the judgment. *Held*: "The appeal from the order overruling the motion for a nonsuit is dismissed, the judgment is reversed, and the cause remanded."

From the Ninth Judicial District, Siskiyou County.

The complaint for divorce alleges marriage, residence, and assigns as grounds: Willful desertion for four years; cruel and inhuman treatment by reason of clandestine removal of children to Oregon, causing plaintiff great mental suffering; and lastly, willful neglect.

Defendant denied all the above allegations, and alleged that his business called him to reside at Sawyer's Bar where he requested plaintiff to come, but she refused, and continued to reside at Fort Jones; that he removed the children to Oregon for the purpose of educating them at the Ashland Academy.

The evidence adduced for the plaintiff showed a separation of the parties during four years; that plaintiff was supported partly by her parents and partly by her own exertions; that she had received from defendant by the hands of third persons at various intervals the sums of \$20, \$10, \$48 and \$75; also procured some store supplies on defendant's account: never applied to defendant for support, because had heard that he made the remark that he would not support her as long as she lived in her mother's house, and also because she could support herself. Defendant provided some clothing for the children and paid schooling for a short time. He removed the three children on Saturday, and wrote to plaintiff on Monday informing her where they were. Plaintiff was greatly afflicted in mind and unfitted for business by the loss of her children, and succeeded in recovering two of them from Ashland. She further testified to his threats of whipping her, and to his intemperate and gambling habits.

A motion for a judgment of nonsuit being denied, the defendant declined to offer testimony, and the court below rendered a decree of divorce. From the order denying a nonsuit, as also from the decree, the defendant appealed.

C. Edgerton and J. L. Murphy, for appellant.

E. H. Autenrieth and J. Berry, for respondent.

PER CURIAM.

The complaint for a divorce proceeds upon three grounds: First, willful desertion; second, extreme cruelty; third, willful neglect. The allegations of the complaint are denied by the answer. The cause was tried before the court. No evidence was offered by the defendant. The court below found all the issues for the plaintiff.

We have carefully examined the evidence sent up in the

record, and we think that it utterly fails to establish either of the grounds set forth in the complaint as grounds of divorce.

The appeal from the order overruling the motion for a nonsuit is dismissed, the judgment is reversed, and the cause remanded.

[No. 5,687.]

[Filed April 22, 1878.]

LIVINGSTON, RESPONDENT, vs. MORGAN, APPELLANT.

JURISDICTION OF JUSTICES' COURT.—An action for trespass on real property, in removing fences, is within the jurisdiction of a Justice of the Peace, where the gravamen of the action is plaintiff's possession of the land, and the damages sued for are less than three hundred dollars. *Pollock vs. Cummings* (38 Cal. 683) cited.

JUDGMENT — GOLD COIN.—In an action upon a tort, a judgment in gold coin is irregular, and the judgment will be modified upon appeal.

From the Fifteenth Judicial District, Contra Costa County.

This action was commenced in a Justices' Court to recover \$299 damages for defendant's taking and carrying away a fence from land averred to be in possession of plaintiff. Defendant in his answer, demurrer being overruled, set up title to the land, and under Code of Civil Procedure, § 838, the action was transferred to the District Court. The complaint after alleging possession of the land, the ownership of the fence, the trespass, breaking down fence, destruction of crops, etc., prayed for a gold coin judgment. In the Justices' Court the defendant demurred to the jurisdiction of the subject matter.

The case was tried before the District Court without a jury, and judgment rendered in favor of the plaintiff for \$117 in gold coin and costs taxed at \$103. The defendant appealed on the judgment roll.

Eli R. Chase, for appellant, assigned two errors: First, the overruling of defendant's demurrer; and secondly, the "gold coin" judgment. On the point of jurisdiction raised by the demurrer counsel argued: "Take the case at bar, suppose the plaintiff had alleged in this form: 'That on or about the 1st of May the plaintiff was in possession of the following described tract of land, situate, etc., and certain fences

were then and there standing and being thereon, etc.' These allegations would have brought the case within the jurisdiction of the Justices' Court, under the rule laid down in *Pollock vs. Cummings* (38 Cal. 684). Then if defendant had admitted the plaintiff's possession, but showed the possession to be wrongful or himself to be the rightful possessor or owner, the case would have come under Section 838, and the Justice having had original jurisdiction would have been ousted of jurisdiction by the answer. But if the Justice had not original jurisdiction the answer and transfer does not confer jurisdiction on the District Court." He contended that this was a District Court action erroneously brought in a Justices' Court, and its transfer to the District Court could not repair the defect.

H. Mills and J. P. Jones, for respondent.

PER CURIAM.

The only respect in which this case is claimed by appellant to differ from that of *Pollock vs. Cummings* (38 Cal. R., 683), is in the fact that the complaint here alleges that the plaintiff was the *owner* of the fences standing upon the land mentioned therein. But this averment added nothing to the complaint or to the cause of action therein set forth, and the gravamen of which was the fact of possession of the land by the plaintiff when the alleged trespasses were committed by the defendant.

The averment as to ownership of fences might be stricken out, and the cause of action and proof which might have been adduced in its support, would be precisely the same.

We think, therefore, upon the views stated in the case referred to, the Justice must be held to have had jurisdiction of the action before its transfer to the court below.

2. But the judgment for *gold coin* can not be supported, and it must be modified accordingly.

The judgment of the court below is therefore modified by striking therefrom the words "*in gold coin of the United States*," and the cause remanded with directions to make such modification; the appellant not to recover of the respondent any costs occasioned by this appeal.

In the Circuit Court of the United States,
OF THE NINTH JUDICIAL CIRCUIT, DISTRICT OF CALIFORNIA.

JOSEPH A. DONOHOE vs. THE MARIPOSA LAND
AND MINING COMPANY OF CALIFORNIA ET AL.

1. **FORECLOSURE OF MORTGAGE—REMOVAL.**—Where D., a citizen of California, filed a bill to foreclose a mortgage against M., the mortgagor, also a citizen of California, and F. a subsequent incumbrancer and a citizen of New York, there can be no final determination of the controversy between D. and F. without the presence of M., and the suit is not removable by F. to the Circuit Court of the United States under Section 689 of the Revised Statutes.
2. **SAME.**—Neither in such case where the only controversy is as to the validity of the mortgage, and whether there is anything due on it, is there "a controversy which is *wholly* between citizens of different States," or "which can be *fully* determined as between them," within the meaning of Section 2 of the Act of March 3, 1875 (18 Stat. 470), and the case can not be removed to the National Courts under the provisions of that Act.
3. **SAME—CROSS-BILL—REMOVAL.**—Where a cross-bill filed by one defendant against complainant, and its co-defendant only sets up the same matter as that set up in the respective answers of the defendants to the original bill, it is merely matter of defense, and in no way affects the right of removal under the statutes cited.

SAWYER, Circuit Judge.

This suit was brought in a State Court by the complainant, a citizen of California, against The Mariposa Land and Mining Company of California, a corporation created under the laws of California, and The Farmers' Loan and Trust Company, a corporation created under the laws of New York. The object of the suit is to recover a balance of something over one hundred and forty-five thousand dollars and interest, alleged to be due complainant from The Mariposa Land and Mining Company of California, upon certain promissory notes, and to foreclose a mortgage given by said defendant upon large landed estates situate in California to secure the payment of said sums so alleged to be due. The bill alleges

that The Farmers' Loan and Trust Company has, or claims, some interest by way of lien or mortgage upon the same premises, which is subsequent and subject to the mortgage of complainant, and on that ground prays that said corporation be made defendant. Each defendant answered separately, and each, so far as the matters in contest are concerned, set up the same defense, which is in substance as follows: That a corporation existed in New York, created by the laws of that State, named The Mariposa Land and Mining Company of New York, having its property in this State, to-wit: the Mariposa Mine; that the embarrassments arising in a case where a corporation and its property were thus divided led to the necessity of discontinuing the New York corporation, and establishing a new corporation in California, where the property is, as its successor; that, accordingly, a new corporation was created in the latter State named The Mariposa Land and Mining Company of California, one of the defendants; that to this corporation the New York Company transferred its property on condition that it should assume the payment of the New York Company's indebtedness; that Donohoe, the California plaintiff, was the partner of Eugene Kelly in New York; that between Kelly and the said New York Company a fraudulent agreement was made, to which Donohoe was privy, whereby, in consideration of Kelly's previous relations with that company, and his control over its interests, a fraudulent and collusive indebtedness from the New York Company to him was pretentiously created; that this spurious claim was presented to the new California organization as one of the honest debts which it had assumed to pay; that in ignorance of its true character the California Company, defendant herein, executed to Donohoe, as trustee for himself and said Kelly, and at the instance of the latter, a mortgage for the said pretended debt; that this debt included certain other moneys advanced by Donohoe and Kelly for the payment of the expenses incurred in the organization of the company in California; that so far as that item of the mortgage was concerned it constituted a true and valid debt; that for the entire indebtedness thus

created said mortgage and promissory notes of the California corporation in suit were given; that certain of these notes embraced the amount advanced as above mentioned for the payment of the expense of organization; and that these notes have all been paid, and by plaintiff are admitted to be paid.

The Farmers' Loan and Trust Company further sets up in its answer, that after the making of said notes and mortgage the defendant, The Mariposa Land and Mining Company of California, executed in its favor another mortgage to secure an indebtedness for \$500,000, the validity whereof is not yet disputed. But whether disputed or not, is a matter of no interest to the complainant which is the first incumbrancer, and there can be no controversy between the complainant and The Farmers' Loan and Trust Company on that point. The Farmers' Loan and Trust Company then removed the case from the State Court to the United States Circuit Court, and after such removal filed its cross-bill against the complainant, Donohoe, and its co-defendant, The Mariposa Company, in which it alleges with more fullness of detail the said matters before alleged in the answers of the respective defendants to the original bill, and asked that the matters be adjudicated, the complainant's mortgage canceled, and for a foreclosure of its own mortgage.

The complainant now moves to remand the cause to the State Court on the ground, among others, that it is not a case which the statute authorizes to be removed.

The counsel of the defendant removing the cause, insist that the case is one for removal both under Section 639 of the Revised Statutes embodying the provisions of the Act of July 22, 1866, and under Section 2 of the Act of March 3, 1875 (18 Stat. 470). In the petition it is stated, in express terms, that the application is made under the Act of 1875, but it is insisted that the facts make a case for removal under either. It seems to be assumed in the brief filed, that there is no difference in the requisites with respect to the character of the controversy for removal under either act; and that the only difference is in the consequences — under the Revised Statutes the action being divided into two parts, one

part being removed and the other remaining in the State Court, while under the Act of 1875 the whole suit is removed. The provision of the Revised Statutes, so far as applicable, is: When a suit is by a citizen of a "State against a citizen of the same, and a citizen of another State, it may be so removed, as against * * * said citizen of another State, upon the petition of such defendant * * if so far as relates to him it * * is a suit in which there can be a final determination of the controversy, so far as concerns him without the presence of the other defendants as parties in the cause." (Sec. 639.) For the purposes of the decision, I shall assume, without deciding the point, that this provision is not repealed by subsequent acts.

The provision of the Act of 1875 invoked is: "When in any suit mentioned in this section there shall be a controversy which is *wholly* between citizens of different States, and which *can be fully determined* as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit," etc. (18 Stat. 470.)

The construction of the Act of 1866 (Sec. 639 Rev. Stat.) upon this point in a very similar case, has already been determined by the Supreme Court. Gardner, a citizen of New York, conveyed lands in Tennessee to Walker, a citizen of Tennessee, in trust by way of mortgage to secure moneys due to Vassar, who afterward died, and Brown, a citizen of Tennessee, became administrator. Brown, as administrator, filed a bill in the State Court in Tennessee against Gardner of New York, the debtor, and Walker, the trustee, of Tennessee, to foreclose the mortgage. Thus, as in this case—in an action to foreclose a mortgage—the complainant and one defendant were citizens of the same State, and the other defendant a citizen of another State. The case having been removed by Gardner, the defendant, who was a citizen of another State, to the United States Circuit Court, under the Act of 1866, it was by that court remanded. An appeal having been taken to the Supreme Court, that court, in deciding the case, speaking by the Chief Justice, says: "The motion

of Gardner, the mortgagor, to transfer the cause, as to himself, to the Circuit Court, under the provisions of the Act of July 27, 1866, could not be granted unless there could be a final determination of the cause, so far as it concerned him, without the presence of the other defendant as a party. And we think that the Circuit Court was right in the opinion that Walker was a necessary party to the relief asked against Gardner, and in refusing to entertain jurisdiction and in remanding the cause. The bill prayed a foreclosure of the mortgage by a sale of the land. This required the presence of the party holding the legal title. The complainant had only the equitable title. Walker held the legal title. The final determination of the controversy, therefore, required his presence ; and as the cause was not removable as to him, under the authority of *Coal Company vs. Blatchford* (11 Wallace, 172) it could not be removed as to Gardner alone." (*Gardner vs. Brown*, 21 Wal. 40.) This settles the claim of the defendant under Section 639 of the Revised Statutes.

The bill in this case prays a foreclosure of the mortgage by a sale of the land. This, in the language of the Supreme Court, "requires the presence of the party holding the legal title," and that party is The Mariposa Land and Mining Company of California. The complainant here, as in the other case, has only an equitable claim—a lien to secure his debt—and the other defendant has only a lien on the surplus. The case is, therefore, not within the Act of 1866, or the corresponding provision of the Revised Statutes. (See also The Sewing Machine Cases, 18 Wal. 583.) If, as defendants' counsel seem to assume, the conditions upon which the transfer can be made under this branch of the statute in the two acts are the same, although expressed in different language, and only the consequences differ, then this decision under the Act of 1866, also, settles the question under the Act of 1875. But we will examine the provisions of the Act of 1875 upon their own terms. There must be "a controversy which is *wholly* between citizens of different States, and which can be *fully* determined *as between them*." Now, what controversy is there in this case that is *wholly* between the com-

plainant, Donohoe, and the New York defendant, which can be *fully* determined as *between them?* Donohoe is seeking a decree for a large sum of money, which he claims to be due from the Mariposa Company, and to obtain the money claimed to be due, by a foreclosure of a mortgage and sale of the mortgaged premises, the legal title to which is in said Mariposa Company. He does not claim anything from the other defendant, except to conclude it by the decree against the real defendant, and there is no interest whatever in the foreign defendant except a lien upon the surplus after Donohoe's just demand, whatever it may turn out to be, is paid. The whole contest is primarily and really between complainant and the Mariposa Company—the interest in the other defendant being only secondary. There is but a single indivisible controversy between the complainant and the Mariposa Company, in which the foreign defendant has a derivative interest merely. The controversy between Donohoe and the Mariposa Company is the principal, direct, and only controversy, while that of the other defendant is only incidental by reason of a relation to the debtor voluntarily assumed after the interest of Donohoe attached. The defense set up by the foreign defendant is precisely the same as that set up by the debtor and principal defendant, and must be sustained by the same evidence. Its own defense must be made through the Mariposa Company, as its rights were derived through it alone. It succeeds to a lien upon what the Mariposa Company had left after satisfying the claim of Donohoe—nothing less, nothing more. It stands to the extent of its lien in its predecessor's shoes. The Mariposa Company is interposed between the complainant and the other defendant in the contest. There is no charge of collusion between Donohoe and the Mariposa Company; and there is no defense set up which is not, also, the defense of the Mariposa Company. The controversy, therefore, is one and indivisible, and not wholly or principally between the complainant and the foreign defendant, but the latter's controversy is merely incidental to the real substantial controversy, which is between Donohoe and the other defendant. Again,

the controversy can not "be *fully* determined as between them," or determined at all without the presence of the Mariposa Company. A decree in a proceeding between Donohoe and The Farmers' Loan and Trust Company, without the presence of the Mariposa Company, would be futile. It would in no way conduce to the accomplishment of the object of Donohoe's suit. There would be no practical or useful result if Donohoe should succeed. How then can it be said that the controversy can be "*fully* determined as between them," when the determination, if in Donohoe's favor, would be fruitless? A decree between Donohoe and The Farmers' Loan and Trust Company alone would not affect the rights of the Mariposa Company, and no effective sale of the premises under it could be had. No party would bid at such a sale, because a sale would transfer nothing tangible.

So a decree against The Mariposa Land and Mining Company alone would not affect the rights of the other defendant; and, as has often been held in this State, a clear title would not pass by sale under such a decree. The decree in neither case, therefore, would afford the remedy sought, and I do not know of any means by which parties could safely purchase under both. There could, then, be no separate determination of the controversy which would afford either singly or together an effectual remedy to Donohoe. It is no answer to say, that the whole suit would be transferred, and that then there would be but one decree, which would bind all parties, for we are not discussing the question as to what would be transferred, but are dealing with the test which the statutes have prescribed, by which to determine whether anything can be transferred. And that test is that there must be a controversy which is *wholly* between the separate parties, which can be *fully* determined as between them so as to be effectual in separate actions. If such determination can not be had separately and independently, then the case is not one which the statute authorizes to be transferred at all, either wholly or in part. Besides this case is not within the reason upon which the jurisdiction is based. The only real controversy being between

citizens of the same State, the interposition of the Mariposa Company between the complainant and The Farmers' Loan and Trust Company, which is only incidentally interested through its co-defendant, is presumed to be a sufficient safeguard against any prejudice that might exist. It is, doubtless, upon this very theory that the act is framed with the limitations found in it.

In my judgment the case clearly does not present a controversy, which is *wholly* between citizens of different States, which can "be *fully* determined *as between them*" within the meaning of the statute. Even the authorities cited by defendants' counsel properly considered sustain this view. For example, Judge Dillon's tract on "Removal of Causes" is cited wherein he says (p. 30), "*If the substantial controversy is wholly between citizens of the same State, it is not, and can not become, one of Federal cognizance; but if the real litigation is between citizens of different States, the case is within the Constitutional grant of Federal judicial power, notwithstanding some of the adversary parties may happen to be citizens of the same State with some of the plaintiffs.*" In this case the substantial controversy is between the complainant and the Mariposa Company. So again, he cites Mr. Justice Davis' observation from a note in Dillon on Removals (p. 35), "that the intention of Congress, plainly expressed in the Act of March 3, 1875, was, that where the *main* controversy in a case was between citizens of different States, it was removable, and carried with it all the *incidents*; and that a *mere incident* would not prevent the case from being removed." If this be true, and I have no doubt that it is, the converse of the proposition is equally true; and if the *main* controversy is between citizens of the *same* State, it is not removable, and the mere incident will not confer a right of removal. The incident must follow the real controversy to which it is inseparably annexed. In this case, there is but *one indivisible controversy*, and that is as to whether there is really anything justly due from the Mariposa Company to the complainants, and if so, how much. And that controversy is directly and primarily between the complainant and his alleged debtor and mortgagor. There is

no subordinate, independent, or other controversy between the complainant and the foreign defendant. Its interest in this same controversy is only incident to the main controversy by reason of its relation to the debtor and real party. These views appear to me to be sustained by the current of decisions on the circuit. (See *Chicago vs. Gage*, 6 Bissell, 467; *Osgood vs. D. & V. R. R. Co.*, Ib, 331; *Arrappahoe County vs. K. P. R. R.*, 5 Cent. L. Jour. 102; *Cape Gir. and St. L. R. vs. Winston*, 4 Cent. L. Jour. 127; *Carraher vs. Brennan*, 4 L. & Eq. Rep. 159; *Tyler vs. Hagerty*, 5 Reporter, 300; *Latham vs. Barry*, 4 L. & Eq. Rep. 459; *Peterson vs. Chapman*, 13 Blatch. 395; *First National Bk. of Manhattan vs. The King Wrought Iron Bridge Co.*, 2 Cent. L. Jour. 505, 616.)

It is urged by defendants, that, since the removal, the foreign defendant has filed a cross-bill against the complainant and its co-defendant, and that as to the cross-bill, there is a suit pending in which the complainant is a citizen of New York, and all the defendants are citizens of California, and that the suit for this reason is now properly in this court, whatever the case might have been at the time of the removal. But the cross-bill, so far as the complainants in the original and cross-bills are interested, sets up precisely the same matters as were set up by both defendants in the original bill. It is but a repetition of the defense already set up in the answers of both defendants. It could not go beyond the matters of the original bill. "A cross-bill is a defense." (*Gallatin vs. Irwin*, Hop. Ch. R. 58-9.) "The original bill and the cross-bill are but one cause." (3 Dan. Ch. Pr. 1743, Ed. 1851.) "Both the original and cross-bill constitute but one suit." (*Ayer vs. Carver*, 17 How. 595.) "It should not introduce any distinct matter. It is auxiliary to the original suit, and a *graft and dependency on it*." (*Rubber Co. vs. Goodyear*, 9 Wal. 809; *Cross vs. De Valle*, 1 Wal. 5; *Field vs. Schieffelin*, 7 John. Ch. 252.) The dismissal of the original bill before a hearing would doubtless carry the cross-bill with it as a part of the suit. (*Slason vs. Wright*, 14 Vermont, 209-10.) The fact, therefore, that a cross-bill has been filed setting up the same matters put in issue by

the original bill and answers can not change the character of the case, or affect the question of jurisdiction. The original bill is still the suit, the cross-bill being but an appendage constituting a part of it.

The view taken upon the main question renders it unnecessary to notice the technical objections taken to the removal.

The cause must be remanded to the State Court with costs, against the party removing it, and it is so ordered.

May 6, 1878.

Jno. T. Doyle and Wm. Barber, for motion.

J. W. Winans, S. Heydenfeldt, and McAllisters & Bergin, *contra*.

Negligence—Passenger Landing from Steamboat.—Appellee was a passenger on one of the boats belonging to appellant, and was injured while on the staging, going ashore, being struck by the handles of a coal-box in the hands of the workmen of the boat. This was at Quincy, and it was maintained that appellee ought to have remained in the cabin for the two hours the boat was to remain at the wharf. *Held*, that such an objection is untenable. That appellee, in thus landing, could not be held to extraordinary care and prudence, as there was no appearance of danger. There was no similarity in this case to the case of a passenger attempting to leave a train before reaching the platform. Carriers of passengers for hire are bound to the utmost care and diligence in providing for their safety, by the use of efficient and suitable modes of carriage, and in managing, directing, and using these means thus provided. The decrees of care, vigilance, and skill, are the highest; and the responsibility is for the least neglect known to the law short of insurance. Sup. Ct., Illinois, Feb. 9, 1878. *Keokuk N. L. Packet Co. vs. True.*

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Current Topics.

THE very important constitutional question, of the validity of the exemption laws passed by State Legislatures as to existing debts, has been passed upon very recently by the Supreme Court of the United States in the case of *Edwards vs. Kearny*. The court held that the remedy, subsisting in a State when and where a contract is made and is to be performed, is a part of its obligation; and any subsequent law of the State which so effects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution, and is therefore void. That the law of North Carolina, exempting personal property and a homestead of a debtor from sale under execution, is unconstitutional, and invalid as to debts contracted before its enactment. We will soon publish this very important opinion in full.

IN *Winters vs. Browner, Administrator*, just decided by our Supreme Court, it was held that an action was not barred by Sec. 1496 of the Code of Civil Procedure, when begun within three months of the date of an actual rejection of a claim by an administrator. In this case the plaintiff presented his claim on February 3d, 1877, to the defendant as administrator. No action was taken by the administrator, either to allow or reject the claim, until the 17th day of March, 1877, when he rejected the claim by endorsing his objection thereon. The complaint was filed June 2d, 1877.

The defendant claimed that the action should have been brought within three months after February 14th, being the

tenth day after the claim was presented, and that the statute raised the presumption of rejection on that day.

The plaintiff contended that the statute was a provision for the benefit of the claimant, and that he may waive it and allow the administrator further time.

CROCKETT, J. and RHODES, J. dissented.

Supreme Court of California.

APRIL TERM, 1878.

[No. 5,827.]

[Filed April 22, 1878.]

ELLIOTT, APPELLANT, vs. PECK, ADMX., RESPONDENT.

FINDINGS—ESTATES OF DECEDENTS.—In an action against an administrator upon a disallowed claim, the presentation of which was made after the ten months had elapsed, it is necessary that the precise time when the claim became due appear in the findings. C. C. Pro., § 1493.

Appeal from the Twentieth Judicial District, Santa Cruz County.

On the 28th of August, 1872, Elliott and Peck owned 200 feet each in certain quicksilver mines in San Luis Obispo County, known as The Santa Cruz Mine and San Lorenzo Claim. Elliott's health being bad, and Peck being his warm friend, the former conveyed to the latter by deeds absolute his interests, in order to facilitate a sale. No consideration passed. Peck died September 14, 1873, intestate, not having sold the property. The respondent, as administratrix, gave notice to creditors October 30, 1874. In June, 1875, under an order of the Probate Court, she sold the mining interests for \$6,575. Plaintiff Elliott, on the 17th of September, 1875, presented his verified claim in the usual

form against the estate for his half of the proceeds, which was disallowed. The estate was then on the 26th of August, 1875, fully distributed and the money on hand paid over. On November 8th, on application of Elliott, the Probate Court vacated the decree of distribution, and this action for money had and received for plaintiff's use and benefit was commenced December 14, 1875.

The court below rendered judgment in plaintiff's favor for the half of net proceeds of the sale, but granted a new trial on the grounds that Mrs. Peck, the administratrix, should have been allowed to testify, and that parol evidence should not have been admitted to defeat deeds absolute. From the order granting a new trial the plaintiff, Elliott, appealed.

C. B. Younger and F. Adams, for appellant.

J. H. Logan, for respondent.

PER CURIAM.

There is no finding from which it can be seen at what precise time the claim of Elliott became due. This was necessary in order to determine whether the presentation of the claim—made on the 17th of September, 1875—was within the time required by the statute. Remittitur forthwith. (Code of Civil Procedure, Section 1493.)

— — —

[No. 5,802.]

[Filed, April 20, 1878.]

BAGGS ET AL., RESPONDENTS, VS. SMITH, APPELLANT.

FINDINGS.—Omission to find upon a counter claim is error.

FINDINGS—APPEAL—AMENDMENT.—Amending the findings after an appeal taken, for that reason if for no other, is error.

Appeal from the Twentieth Judicial District, San Benito County.

Action to recover \$1,200, the value of services rendered by Baggs & Tully, attorneys and counselors-at-law, at de-

fendant's instance. The answer denied the indebtedness, and averred that plaintiffs were employed at a certain *per diem* for the time actually employed, and a fee of \$100, contingent upon success, all of which has been paid. For a counter claim, the answer set up an indebtedness of plaintiffs for \$75 borrowed money. The findings were that plaintiffs were employed as attorneys to prosecute a probate proceeding, without any special contract as to fees; that they attended to the case until a final distribution was had, by which defendant realized \$2,500, and that the services were worth \$400. From the judgment entered pursuant to the foregoing, the defendant appealed on the 29th of June, 1877. On August 6th, 1877, upon motion the court amended its findings, allowing the \$75 set up in the counter claim, but finding the indebtedness \$400 over and above the counter claim, and from this order the defendant also appealed.

William Leviston, for appellant.

James N. Breen and Drake & Rix, for respondents.

PER CURIAM.

The findings filed June 4th, 1877, are insufficient to support the judgment entered on that day, in that they did not respond to the issue joined upon the counter claim of the defendant for the alleged loan of moneys to the plaintiffs. It is the settled rule that the material issues made by the pleadings must be responded to by the findings.

The order of August 6th, 1877, amending the findings was also erroneous, if for no other, for the reason that the cause was then pending in this court upon appeal from the judgment, and under such circumstances the court below had no authority to make new or further findings in the cause.

Judgment and order of August 6th, 1877, reversed, and cause remanded for a new trial.

[No. 5,462.]

[Filed April 22, 1878.]

SMITH, APPELLANT, vs. LAWRENCE, RESPONDENT.

FINDINGS—WAIVER—BILL OF EXCEPTIONS.—Where appeal is taken by bill of exceptions or statement, the fact of non-waiver of findings must affirmatively appear in order to avail appellant of the error.

Appeal from the Twelfth Judicial District, San Francisco.

Appeal from an order granting a new trial, being the second appeal in the same cause, *vide Smith vs. Lawrence* (38 Cal. 24.) The action was commenced on the 25th day of April, 1867, upon two promissory notes, and judgment rendered thereon February 23, 1875. Defendant's bill of exceptions, after setting forth the exceptions taken during the progress of the trial, concluded with the grounds assigned for a new trial and appears to have been allowed as a whole by the certificate of the District Judge. The body of the bill of exceptions contains no mention of findings, but in the eleventh ground assigned for a new trial the defendant states: "That the judgment should be set aside and a new trial granted because no findings were filed (and the same were not waived) before the entry of judgment."

Upon the decision of the motion, the court below (Daingerfield, J.) *Held*: "In this case it *appears from the statement on appeal* that there were no findings filed and that they were not waived. If this fact appeared by bill of exceptions there can be no doubt under the recent decisions of the Supreme Court, but there would be such error as would reverse the judgment. I can see no difference in principle between a bill of exceptions and a motion for a new trial, as to this error in a trial. The findings are never filed until after a trial, and an assignment of error is practically therefore a bill of exceptions as to such an error." *

E. B. Mastick, for appellant.

E. A. Lawrence, for respondent.

* From this much of the opinion of Judge Daingerfield it will be seen that his decision did not rest "upon the assumption that it appeared in the settled statement that findings of fact had not been waived," but upon the proposition that a mere assignment of this particular error is equivalent to a bill of exceptions.—EDITOR.

PER CURIAM.

The court below granted the motion for a new trial, upon the assumption that it appeared in the settled statement that finding of fact had not been waived. In this it was mistaken. The only allusion to that matter is found in the eleventh assignment of error, in which the fact of non-waiver is assumed as a basis for stating the alleged error therein set forth.

There is no statement in the body of the bill of exceptions that findings had not been waived, and the fact of such non-waiver is not otherwise, or in any manner, made to appear in the record.

There are no specifications of the particulars in which the evidence is insufficient, and there was no error of law committed at the trial, excepted to by the defendant, such as would entitle him to a new trial.

Order reversed. Remittitur forthwith.

[No. 6,008.]

[Filed April 30, 1878.]

GEORGE ATKINSON, RESPONDENT,
vs.
AMADOR AND SACRAMENTO CANAL CO., APPELLANT.*

AMENDMENT—LIMITATIONS.—In an action of trespass, an amended complaint was filed for the purpose of including a portion of a tract inadvertently omitted from the description contained in the original complaint. *Held*, the Statute of Limitations continued to run, as to the omitted land, during the interval of time between the original and the amended complaints.

From the Sixth Judicial District, Sacramento County.
Action to recover \$15,000 damages by reason of injuries to land owned and cultivated by the plaintiff, caused by the washing down of sand, gravel, mud, tailings, and other debris from defendant's hydraulic mining grounds. The defendant

* The transcript in this case contains 777 pages, 2,322 folios, and weighs six and a half pounds. There were, at the trial, about fifty witnesses examined.

commenced mining in 1871, and continued until 1875. It used from four to six hundred inches of water day and night, and the tailings were carried off down the hill toward plaintiff's land by means of flumes, one of which reaches across the line of the land in question; the channel of a creek running through the land was filled up; a dam and canal built by plaintiff to prevent further injury were rendered useless by the accumulated tailings, and finally became buried out of sight; fences were covered and destroyed, and the body of his bottom land was filled with a bed of stones, gravel, and mud, from two to four feet deep.

The original complaint was filed March 30, 1875, counting upon the injuries committed from March 30, 1872. On the 3d of January, 1877, and after the action was called for trial, an amended complaint was filed, upon which the action was tried. The amendment went only to the description of the premises, and was made to bring within the description a part of the injured premises which had been inadvertently omitted from the original complaint. The land formed one entire tract dating from the acquisition of it by plaintiff, but originally constituted minor ranches, one of which was designated as the Clark Ranch. This original complaint omitted to include the Clark Ranch within the description. To the complaint as amended, the defendant plead the Statute of Limitations, (Code of Civil Procedure, § 338, Subd. 2.), and requested the court to instruct the jury in effect that as to the land embraced in the amendment, the plaintiff could not recover damages for any injuries prior to January 1, 1874, which instruction the court refused to give. The jury found for the plaintiff and assessed the damages at \$4,000. Defendant appealed from the judgment upon the exceptions taken during the trial.

W. C. Belcher, Haymond & Coggins, and Benj. Bullard, Jr., for appellant.

H. O. Beatty, Edgerton, Tubbs & Cole, and A. P. Catlin, for respondent.

PER CURIAM.

... Among other instructions asked by the defendant and refused by the court, was the following:

"The jury, in estimating all damages done to the land known as the Clark Ranch, must exclude from consideration any damage or injury done prior to the first day of January, 1874. Whatever injury was done before that time can not be recovered in this action."

The original complaint was filed on the 30th day of March, 1875, but in that complaint no cause of action founded upon injuries alleged to have been done to the "Clark Ranch" was set forth. In the amended complaint filed January 3d, 1877, the injury alleged to have been done by the defendant to that ranch was for the first time counted upon and damages therefor claimed. The amended complaint, in so far as it counted upon the injury done to that ranch, was the introduction of a new cause of action and against which the defendant had the right to plead, and did plead, the Statute of Limitations. In view of this plea upon the record, the plaintiff in adducing the evidence in support of his case as to the "Clark Ranch," should have confined himself to proof of injuries, if any, done since the 3d day of January, 1874, and had he done so the giving of the instruction refused, would not have embarrassed the jury in finding a verdict for such damages as had been shown. However this may be, the instruction as asked was correct in point of law, and should have been given to the jury.

Judgment and order reversed and cause remanded for a new trial. Appellants to recover but one-half of the costs upon this appeal.

[No. 4,790.]

[Filed April 29, 1878.]

OAKLEY, PLAINTIFF AND RESPONDENT,
VS.
STUART ET AL., DEFENDANTS, AND MILLER, INTERVENOR
AND APPELLANT.

SIXTEENTH SECTIONS—APPLICATIONS TO PURCHASE.—Applications to purchase six-

teenth and thirty-sixth sections may be filed immediately after the actual survey—the survey in the field—approved by the Surveyor-General.

SAME.—As a question of priority, the first applicant, *after an approved survey in the field*, is entitled to the certificate of purchase when the land is accepted and the Register notifies the State office thereof.

Appeal from the First Judicial District, Santa Barbara County.

This case commenced in March, 1875, is a contest for half a sixteenth section in Santa Barbara County; referred by the Surveyor-General to the District Court under Political Code, § 3414.

The land was surveyed in the field—the township lines in 1854, the section lines January, 1861. This survey was approved by the U. S. Surveyor-General on the 9th of April, 1861, and an approved map thereof filed. The defendant, Linebaugh, in January, 1871, filed an application to purchase in due form, and, having obtained a certificate of purchase afterward, assigned the same to Miller. *On the 11th of April, 1873, the plat of the survey was filed in the U. S. Land Office in San Francisco.* Defendant Stuart, on April 12, 1873, the next day after the filing of said plat in the U. S. Land Office, filed an application in due form for the purchase of the same land, and in his application stated that there was no occupation of said lands adverse to any he had. Subsequently, September 27, 1873, Stuart assigned his certificate to Miller. At one time, also, Cosgrove & Byrne had filed for the whole of the section, but afterward filed an abandonment thereof. The plaintiff, Oakley, made an application for the land on May 6, 1874, in due form, and, upon his demand, the matter was referred to the District Court.

The findings show that the land was vacant in the spring of 1872; that Oakley, the plaintiff, used a part of it for pasturing stock. Afterward Oakley went into possession of a large portion of the tract, and between January 1st and April 1st, 1873, ditched and fenced it, cultivated and sowed grain, and continued to occupy it until the commencement of this suit. Miller, the intervenor, went into the possession of a portion of the premises in the fall of 1873, claiming under his assignments of the certificates of purchase issued to

Linebaugh and Stuart, and continued in possession and cultivation up to the present suit.

The court below (Murray, J.) held: "Were this question *res integra*, I should follow the construction of the State Land Office, which entertains applications as soon as the actual survey has been made and approved. But I am constrained to rule that the case of *Rooker vs. Johnson* (49 Cal. 3), is conclusive against the validity of Linebaugh's application, inasmuch as that decision determines that the survey is incomplete and the land not subject to application for purchase, until the filing of the approved plat in the U. S. District Land Office. Under the authority of *Wood vs. Sawtelle* (46 Cal. 389), I further hold that the application of Stuart was also void for the reason that there was adverse occupation in Oakley at the time of Stuart's filing."

Judgment was entered for the plaintiff, Oakley. Miller took this appeal.

J. F. Stuart, *in propria persona*, R. M. Dillard, E. Fawcett, Gray & Haven, H. H. Haight, and E. R. Taylor, for appellant.

W. C. Stratton, for respondent.

PER CURIAM.*

The only material question is the validity of Linebaugh's application.

The statute provides: "Whenever a resident of this State desires to purchase any portion, not less than the smallest legal subdivision, of the 16th or 36th section of any township, *which has been surveyed by authority of the United States*, he shall make an affidavit, etc."

It would seem to have been the practice of the State Land Department, since the passage of the law, to treat as properly filed, applications filed at any time after *survey in the field*, and the approval thereof by the Surveyor-General. This practice accords with the natural meaning of the words

* A former opinion of the court was delivered by Mr. Justice Rhodes on the 11th of December, 1875, Mr. Justice Crockett specially concurring, and with him concurred Justices McKinstry and Nilea. In that decision the judgment below was affirmed. A rehearing was subsequently granted, resulting in a reversal of the judgment, but with two dissenting members of the court.

of the statute, and unless it has been proved to be productive of confusion, or promotive of litigation, or otherwise to conflict with the policy of the law, we see no reason why the courts should depart from the construction given to the Act by those immediately charged with its administration.

The question was not involved in *Rooker vs. Johnson* (49 Cal., 3), for no one of the several applications in controversy in that case was made intermediate to the survey in the field (the exact time of which did not appear) and the filing of the official plat in the Land Office.

Some of the applications under consideration in that case were filed in 1868, which was before the survey was made in the field. All the other applications were made after June 4, 1869—the day on which the plat of the survey was filed in the Land Office.

It is apparent, therefore, that the question made here was not presented, and could not have been presented for consideration in that case.

Section 12, of the Act of 1868, provides that when an application is made, the Surveyor-General shall communicate with the proper United States Land Office, and ask that the land applied for shall be accepted in part satisfaction of the grant to the State, and only after the Register has notified the State Office of the acceptance of the land, can the State issue a certificate to the purchaser. The Register may not be able to inform the State Office that he has accepted or rejected the land until after the official survey has been returned to his official custody. The State officer can issue the certificate only after the notice of acceptance, because the State law provides that he shall issue the certificate only on receiving notice from the Register. All this does not prohibit the resident from making his application to the State before the approved plat has been filed with the Register. The State may dispose of the land it owns in the present or in expectancy, in such manner as the Legislature may deem proper. Whether the application is made before or after the filing of the approved plat, the applicant's right to the land depends on the contingency that the Register shall ac-

cept it as part of a grant to the State. When the land has been accepted and the proper State officer notified, it is his duty to issue his certificate to the applicant who first—after approved survey in the field—made application by affidavit in due form.

The “application” by the citizen or resident, and the recognition by the United States officer of title in the State, are not contemporaneous. From the very nature of the proceedings, the rights of all applicants must remain in abeyance until the application has been accepted by the Register; then the right to a certificate attaches in favor of the applicant first in time after the *survey*. No inconvenience, therefore, can arise from according to the statute the meaning heretofore understood by the officers of the State Land Department to be the correct meaning.

The only question here is, which of several applicants was entitled to a certificate, when the State office became authorized to issue a certificate by reason of a notification from the Register that the application for the land had been accepted as portion of a grant to the State.

We find little difficulty in answering. He who filed first after the *actual survey*—the survey in the field—approved by the Surveyor-General.

We are the more thoroughly convinced that the views above expressed are correct from the circumstances, that, under the public land system and practice of the Land Department of the United States, lands have always been treated as *surveyed* when the lines were run in the field and monuments or marks established by the proper surveyor.

By the Act of Congress of March 3, 1853, (1 Lester, p. 207, Sec 6,) the general pre-emption law of September 4, 1841, was first extended over California. (1 Lester's Land Laws, pages 61 to 63, Sections 10 to 15 inclusive.) This law allowed pre-emptions *only on surveyed lands*, and in the eleventh section is the following clause: “When two or more persons shall have settled on the same quarter section of land, the right of pre-emption shall be in him or her who made the first settlement.”

After this law was passed it became necessary to settle the question when lands of the United States should be "treated as surveyed," and on the 15th of September, 1841, the Commissioner of the General Land Office issued his circulars to Registers and Receivers of the United States Land Offices, upon this point, as follows: "The approval of the plat is the evidence of the legality of the survey; but in accordance with the spirit and intent of the law, and for the purpose of bringing the settler within its provisions, the land is to be considered as surveyed when the requisite lines are run in the field and the corners established by the Deputy Surveyor." (1 Lester, page 364.)

Hence, whenever a map of the survey of a township is filed in the United States Land Office, descriptive field notes of the survey of said township are required to be filed with said map (see 1 Lester, pages 722-724, for map and instructions); and in case a contest arises between two settlers who settled on the land after the survey and before the map was filed in the Land Office, the Register and Receiver can refer to the map and descriptive field notes, and ascertain when the land was surveyed in the field, and which of the two settlers first settled after said survey in the field, so as to award the land to the first settler, in accordance with the eleventh section of the Act of September 4, 1841, and the Commissioner's instructions of September 15, 1841. (1 Lester, 364.)

The seventh section of the Act of Congress of May 30, 1862 (2 Lester, p. 48), has the following: "That in regard to settlements, which *by existing laws* are authorized, in certain States and Territories, upon unsurveyed lands, which privilege is hereby extended to California, etc."

In the existing laws referred to above are the following: "That if, when said lands are *surveyed*, it is found that two or more persons have settled upon the same quarter section, each shall be permitted to enter his improvement, as near as may be by legal subdivision." (1 Lester, 238, No. 255.) Here then the Register and Receiver have to refer to the map and descriptive field notes of said land, to see if both or all of said settlers, claiming the same quarter section of land

under said law, actually settled before the survey of the land in the field, when the lines and corners of the sections were clearly defined on the ground, and, as a consequence, whether their settlement was not in violation of law, and a fraud on the first settler who actually settled before the survey of the land in the field.

The Act of Congress of February 26, 1859, has the following: "That where settlements, with a view to pre-emption, have been made *before the survey of lands in the field*, which shall be found to have been made on sections sixteen or thirty-six, said sections shall be subject to the pre-emption claim of said settler, etc." (11 U. S. Statutes, 386; 1 Lester, 306-308, No. 353.)

In Zabriskie's *Land Laws of the United States* is the following: "The State acquires a right to all the 16th and 36th sections immediately after such survey *in the field* has been made as will enable a person to determine the locality of said sections." (Pages 493-494.)

In the *General U. S. Land Office Report* for 1871, on page 35, is the following: "As soon as, in running the lines of the public surveys, the school sections *in place* are affixed and determined, the appropriation thereof for the educational object is, *under the law*, complete except where they are found to be covered by prior adverse rights."

Thus it will be seen that under the law and instructions of the Commissioner of the General Land Office, and the practice of the Land Department of the Government of the United States, lands are treated as surveyed "*when the requisite lines are run in the field, and the corners established.*"

We think that the conclusion of the court below, that the application of Linebaugh was void, was erroneous.

Judgment reversed, and cause remanded. Remittitur forthwith.

We dissent:

CROCKETT, J.

RHODES, J.

[No. 5,183.]

[Filed April 20, 1878.]

JOHNSON ET AL., RESPONDENTS,
VS.
SQUIRES, APPPELLANT.

FINDINGS.—A finding, "that all the issues of fact raised by the pleadings are hereby found and decided in favor of the plaintiffs and against the defendant," is indefinite and insufficient.

SAME.—The court below should determine in the findings what are the issues raised in the pleadings.

Appeal from the Seventh Judicial District, Solano Co.

This action was to quiet title, and the complaint was in the usual form. The answer of Squires was a general denial and an allegation of purchase of the land from one Jenkins, entry into possession, erection of a house worth \$500, and forcible possession taken by plaintiffs in removing the lock from the door and placing a new lock thereon. An amended answer contained a prayer that conveyance be decreed from plaintiffs to defendant with general relief. The facts were that in 1868, Jenkins, being owner, made a parol sale to Squires, under an agreement jointly to erect a saloon. Squires procured the lumber and executed his part of the agreement. In 1869, Jenkins conveyed by deed, while Squires was in possession, to Perry and Chase, under whom the plaintiffs now claim. Squires remained in possession until an ouster by plaintiffs. There was further evidence of actual notice to plaintiffs of Squires claim. The findings were substantially: 1. Possession in plaintiffs at commencement of suit. 2. That plaintiffs claim title in fee. 3. That Squires claims adversely. 4. That his claim is without right and he has no title. 5. That all the issues of fact raised by the pleadings are found in favor of plaintiffs and against defendant. The court below rendered its decree in plaintiffs' favor accordingly. A motion for new trial was overruled and this appeal taken.

M. A. Wheaton and J. McKenna, for appellant.

Wm. S. Wells, for respondents.

PER CURIAM.

The answer of the defendant Squires sets up an affirmative defense, upon which, if proven, he would be entitled to a decree in his favor.

The findings of fact do not, in terms, dispose of the issues tendered by this affirmative defense, and they remain undisposed of unless by the *fifth* finding. This finding is as follows: "That all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of the plaintiffs and against said defendant." We do not think this finding sufficient. To say that all the issues of fact raised by pleadings are found and decided in favor of either party, suggests an inquiry as to what issues are raised by the pleadings—a question often found to be one of no little difficulty to determine, and concerning which, in this case, the views of the court below may be widely different from our own.

We think the finding under consideration as indefinite in its character as the finding that "all the material allegations of the complaint" are resolved in favor of a named one or other of the parties, and which we have held insufficient as a finding of fact.

Judgment and order denying new trial reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 5,249.]

[Filed April 22, 1878.]

McDONALD, APPELLANT, vs. HASELTINE, RESPONDENT.

DAMAGES—NEGLIGENCE OF CO-EMPLOYEE—CIVIL CODE, § 1970.—The common employer is not bound to respond in damages by reason of an employé's negligence, in the absence of evidence that he had neglected to use ordinary care in the selection of the employé.

Appeal from the Twelfth Judicial District, San Francisco.

Action for damages on account of injuries sustained by plaintiff while engaged as longshoreman in loading the ship "Western Shore" with wheat. The proof showed that the

plaintiff was employed by defendant's foreman, Chase; that plaintiff was engaged to take sacks of wheat from a table in the hold of the vessel and stow them in various portions of the hold; that the sacks were slid down upon a chute to the table; that while plaintiff was leaving the table with a sack over his shoulder another sack came down the chute with great force, and after reaching the table it sprang over, struck plaintiff in the back, and broke his leg and otherwise injured him. Chase was defendant's foreman, superintending the work, but there was evidence that he was on deck rigging up slings when the chutes were set, and that the laborers in the hold arranged the chute to suit themselves. It appeared in this case that the chute was too steep, giving too great a velocity to the passage of the sacks.

The jury found for the plaintiff and assessed the damage at \$700. From an order overruling motion for new trial the defendant appealed.

Sidney V. Smith & Son, for appellant.

McAllisters & Bergin, for respondent.

PER CURIAM.

Chase was a person employed by defendant in the same general business as plaintiff.

The common employer was not bound to respond in damages for any injury occurring to plaintiff by reason of the negligence of Chase, in the absence of evidence that he had neglected to use ordinary care in the selection of Chase, as a person properly qualified to discharge the duties imposed upon him, (Civil Code, 1970; *McLean vs. Blue Point M. Co.*, 51 Cal. 255; *Collier vs. Steinhart*, Id. 116.)

Judgment and order reversed, and cause remanded for a new trial.

[No. 5,993.]

[Filed, April 22, 1878.]

ALLEN, RESPONDENT, vs. TIFFANY ET AL., APPELLANTS.

JURISDICTION OF PROBATE COURT—GUARDIAN AND WARD.—An action will not lie

in the District Court to recover for default of a guardian, until after an accounting and settlement in the Probate Court. The latter has exclusive jurisdiction, to determine the state of accounts between the guardian and ward. C. C. Pro. § 1754 construed.

GUARDIAN AND WARD—SETTLEMENTS.—A settlement *in pais* will not support an action for balance due from guardian, unless such settlement has been approved by the Probate Court.

SURETIES—GUARDIAN'S BOND.—The sureties upon a guardian's bond are not liable until the accounts have been passed upon, and a settlement had, in the Probate Court.

From the Seventeenth Judicial District, Los Angeles County.

This is an action on a guardian's bond to recover \$1,824 and interest. The complaint alleges that one F. P. F. Temple was appointed plaintiff's guardian on the 22d of May, 1872, and duly filed his bond in the sum of \$13,000 conditioned, etc., with defendants as sureties. That up to the 19th of November, 1875, the sum of \$669 belonging to plaintiff came to his hands, which has been demanded, but remains unpaid. That after said demand and on Nov. 25, 1876, plaintiff brought suit against Temple and joined defendants as parties, but upon their demurrer for misjoinder being sustained by the court, plaintiff amended the complaint so as to proceed against Temple alone, and obtained judgment for \$669, which remained unpaid. The complaint contains a second count for failure of guardian to file his account to plaintiff's damage, \$300; also for moneys unaccounted for to the amount of \$520, and interest on loans, \$500; and a third count for counsel fees and expenses in prosecuting guardian, \$300.

The defendants demurred to the complaint, and the court overruled the demurrer. Afterward defendants filed their answer, which contained specific denials of plaintiff's allegations of indebtedness; admitted the execution and filing of the bond and the prior judgment against Temple, and set up the *absence of any settlement of accounts in the Probate Court*. Plaintiff demurred to the answer, and the court sustained the demurrer. Defendants declined to amend and the court, upon the evidence offered for the plaintiff, filed its findings and rendered judgment for plaintiff, from which defendants took this appeal.

Bicknell & White, for appellants.
T. H. Smith and E. M. Ross, for respondent.

PER CURIAM.

Section 1754 of the Code of Civil Procedure provides that certain conditions shall form part of the bond of a guardian appointed by the Probate Judge, "without being expressed therein."

Among these are those mentioned in the third subdivision of the section, which reads as follows:

"3. To render an account, on oath, of the property, estate and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other time as the court directs, and at the expiration of his trust to settle his accounts with the Probate Judge, or with the ward if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands or due from him on such settlement, to the person who is lawfully entitled thereto."

The purpose of the provision of the Code is that the Probate Judge shall retain the supervision and direction of the guardian and of his management of the person and estate of the ward, until discharged by the appointing power.

Within a reasonable time after the ward arrives at full age, the statute provides that the guardian may settle his accounts with the ward; but considering the previous relations of the parties, it is not supposed that it was the intention that such settlement should of itself constitute a discharge, or that it should not be subject to the approval or disapproval of the Probate Judge, prior to the discharge by him. The Probate Judge has exclusive jurisdiction to determine the state of accounts between the guardian and ward. The ward may agree upon a settlement with the guardian, subject to the approval of the Probate Judge, or may apply for a citation compelling the guardian to settle his accounts before the Probate Judge. But to hold that prior to such accounting

before the Probate Judge, or to his order approving the settlement *in pais*, the ward may bring suit in the District Court for a supposed balance, would destroy the symmetry and efficiency of the system furnished by our law for the appointment and conduct of guardians of infants.

It appears on the face of the complaint that plaintiff made no attempt to compel an accounting in the Probate Court before bringing the present action. The demurrer to the complaint should therefore have been sustained.

Judgment reversed and cause remanded, with directions to sustain defendants' demurrer to plaintiff's complaint.

Corporation—Liability of Stockholders—Construction of New York Statute.—Defendant was stockholder in a company organized under a general act authorizing the formation of corporations for manufacturing purposes, etc., passed by the Legislature of New York, which provides (Section 10), that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in, and a certificate thereof made and recorded as required in Section 11, which provides that the President and a majority of the Trustees shall, within thirty days after the payment of the last installment of the capital stock, make a certificate of the amount of capital stock fixed and paid in, to be sworn to by such officers and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted which is not to be paid within one year from the time of contracting.

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Current Topics.

THE construction of Section 4047, and subdivision 21 of Section 4,046 of the Political Code, recently came up in *Maxwell vs. Supervisors of Stanislaus County*, in the Fifth District Court.

The Supervisors entered into a contract with J. D. Spencer to do the county publishing and advertising, making said contract without notice or competitive bids. Maxwell obtained a writ of *certiorari* in the District Court, and the court rendered judgment, declaring the contract null and void. The Supervisors claimed that publishing and advertising was not printing, and need not be let to the lowest bidder. The question as to the validity of the acts and payments under the contract, before suit, did not arise. The Supervisors have, since the judgment, paid for the work done under the contract prior to the judgment, and a new proceeding will probably be instituted to test their power to do so. This is the first action involving the construction of Section 4047, which was passed in 1875-6, and as such possesses peculiar interest. The Supervisors have appealed.

WE notice the report of a case commenced in a Justices' Court at San Jose, involving a point of general application and of much interest, regarding the taking of depositions of witnesses in another State to be used in a cause pending in a Justices' Court. The suit was on a note alleged to have been paid by the plaintiff as surety.

An application was made to the County Judge for a commission to take depositions in Oregon, but objection was

made by the defendant on the ground that the County Judge had no jurisdiction, and that there was no provision in the statutes of this State for taking such depositions. The objection was sustained; but the court intimated that if some evidence could be introduced in the Justices' Court so as to get the case to the County Court, a commission might then issue. With this view, the plaintiff's attorneys stated, at the trial before the Justice, that they simply proposed to introduce some evidence so as to get the case to the County Court, and then offered in evidence the note that was paid in Oregon, and a written acknowledgment by the defendant that the plaintiff signed the note as surety. To this evidence the attorneys for the defendant objected as irrelevant and immaterial, no foundation having been laid by connecting the plaintiff with the payment of the note; and upon being informed that the plaintiff had no other evidence with which to follow up the introduction of the note, the objection was sustained, the note and acknowledgment were excluded, and the judgment given against plaintiff for costs. Upon this state of the case, an appeal was taken to the County Court upon questions of both law and fact. The attorneys for the defendant filed a notice in the County Court that they would object to the jurisdiction of the County Court, and moved to dismiss the appeal on two grounds: 1st. That plaintiff stated in the Justices' Court that there was no intention to try the case there, but simply to remove it to the County Court; and 2d, that all the evidence introduced in the court below was excluded, and there was no decision upon a question of fact, by the Justice, to be reviewed on appeal. The plaintiff's attorneys dismissed the case on their own motion.

In Pullman vs. Upton, decided by the Supreme Court of the United States during the present term, it was held that an assignee of corporate stock, who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company or to the creditors of the company after it has become bankrupt.

Supreme Court of California.

APRIL TERM, 1878.

[No. 6,010.]

[Filed May 1, 1878.]

BANK OF SAN LUIS OBISPO, RESPONDENT,
VS.
JOHNSON, APPELLANT.

FORECLOSURE OF MORTGAGE—WHEN NON-PAYMENT OF INTEREST DOES NOT MAKE PRINCIPAL DUE.—Johnson executed a note to the Bank of San Luis Obispo, dated February 2d, 1875, payable two years after date, with interest at one per cent. per month, payable monthly, and if not so paid to be compounded; and as security for the payment of said note, executed a mortgage containing this clause: "In case of default by the mortgagor in the payment of said note or interest, or in the performance of any of the conditions hereof, then the mortgagee may, at its option, either commence proceedings to foreclose this mortgage in the usual manner, or cause the said premises or any part thereof to be sold," etc. *Held*: that the mere failure to pay the interest as it becomes due does not make the principal sum due, and entitle the mortgagees to proceed to foreclosure for the note and interest. The foreclosure proceedings must be limited to the collection of so much interest as may be due.

Appeal from the First District Court, San Luis Obispo County.

This was an action to foreclose a mortgage securing a note given by Johnson to the bank for \$5,000, dated February 2d, 1875, payable two years after date with interest at one per cent. per month, payable monthly, and if not so paid, the interest to become a part of the principal and bear thereafter the same rate of interest until paid. The complaint was filed October 25th, 1876, and alleges that the plaintiff is a corporation duly organized under the laws of California; that on the 2d day of February, 1875, the said defendant executed the aforesaid note; and that in order to secure the payment of said note, "according to the tenor thereof," the defendant did execute and deliver a certain mortgage conditioned for the payment of said note and interest thereon, at

the rate, and at the time, and in the manner specified in said note, and according to the conditions thereof; that the interest on said note has been paid down to the 2d of September, 1875; that nothing more has been paid thereon; that on the 2d day of October, 1875, the defendant refused to pay the interest thereon due on said note, and has made default each and every month in the payment of interest; and by reason of such default in refusing to pay the interest on said note as the same became due, the whole of the principal and interest is now due and payable under and by virtue of the said mortgage.

The mortgage provides, among other things, that "in case of default by the mortgagor in the payment of said note or interest, or in the performance of any of the conditions hereof, then the mortgagee may at its option either commence legal proceedings to foreclose this mortgage in the usual manner, or cause the said premises or any part thereof to be sold at public auction," etc.

To the complaint the defendant filed an amended demurrer on the grounds—1. That the plaintiff has no legal capacity to sue. 2. That the complaint does not state facts sufficient to constitute a cause of action.

This demurrer was overruled and defendant not answering, the court below gave judgment foreclosing the mortgage for the full amount of the note and interest, and ordered a sale of the property.

The bank procured a certified copy of the judgment, and handed it to the sheriff, who sold the said property under said certified copy, and the bank became the purchaser. The defendant appealed from the order overruling the demurrer.*

O. P. Evans, for respondent.

The interest on the debt was by the terms of the note payable monthly, and the mortgage provided that "in the case

*Afterward the bank, through its attorney, made a motion to set aside the sale, and ordering the clerk to issue a proper writ for the resale of said premises, because it thought the sale defective or invalid, having been made under a "certified copy" of the judgment or decree, and not under a "writ," as is provided by Section 684 C. C. P. as amended. The court below granted the motion. The defendant appealed from this order also, but in its opinion the Supreme Court did not pass upon this important question.

of default in the payment of said note and interest" the mortgagees may foreclose. Under these circumstances the mortgagee could foreclose for the whole amount. (*Whitcher vs. Webb*, 44 Cal. 130, 131.)

W. J. and William Graves, for appellant.

The demurrer for want of sufficient facts was well taken. Nothing was due on the note secured by the mortgage at the commencement of the action. The note says in effect if the interest is not paid it compounds. This is the only penalty for its non-payment monthly. The note was the contract of indebtedness and the mortgage its incident merely.

It is only when the note by its terms becomes due that the mortgage may be foreclosed.

No other condition than the payment of interest after September 2d, 1875, is alleged to have been broken. (*Robinson vs. Smith*, 14 Cal. 94.)

The only thing due, if anything, was the interest from September 2d, 1875, to October 2d, 1876. (C. C. P. 728; 23 Cal. 28; 45 Cal. 165.)

PER CURIAM.

"In case of default by the mortgagor in the payment of said note or interest, or in the performance of any of the conditions hereof, then the mortgagee may at its option either commence proceedings to foreclose this mortgage in the usual manner, or cause the said premises or any part thereof to be sold," etc., is the phraseology of the mortgage; but we find nothing in these words, which by fair intendment, gives countenance to the idea that by the mere failure of the defendant to pay the stipulated interest accruing monthly upon the debt, the principal sum should become due. By the distinct terms of the promissory note delivered simultaneously with the mortgage, the principal sum was not to become due until two years after the date of the note—and the stipulations contained in the mortgage are not inconsistent therewith.

Thus the provision already quoted, to the effect that if default be made in the payment of the note or the interest there-

on, the mortgagee may foreclose, etc., is fully satisfied by limiting the foreclosure proceedings to the collection of so much of the interest as may appear to be due. The parties to a loan may, and often do, provide that the principal sum, not otherwise due, may become due by default of the debtor in the payment of interest at stipulated periods of time, but in this instance we do not see that they have done so.

Judgment reversed and cause remanded.

I dissent on the ground that in my opinion on a fair construction of the mortgage, it was the intention of the parties that, on a failure to pay the interest when it became due, the principal should become due at the option of the mortgagee.

CROCKETT, J. .

— — —

[No. 5,940.]

[Filed, May 1, 1878.]

HURD, PLAINTIFF AND RESPONDENT,
VS.
BARNHARDT, DEFENDANT AND APPELLANT.

DAMAGES—MEASURE OF.—In an action for damages for the wrongful seizure and detention of property, the measure of damage is what the use of such property could have been procured for—in other words, the market value—and not what the use of such property was worth to the plaintiff, considering how the plaintiff could and would have used it had it not been taken from him.

DEFENSE—COUNTER CLAIM.—In defense, a counter claim was interposed for pasturing plaintiff's cattle. *Held*: error to require defendant to prove a special agreement for pasture on land not included in a lease from defendant to plaintiff.

Appeal from the Fifth Judicial District, San Joaquin County.

This action was brought for damages sustained by the wrongful suing out of an attachment by the defendant against the plaintiff.

The plaintiff in this action, in his complaint, alleges that at the time of issuing said attachment, he was engaged in the dairy and farming business. That the Sheriff, pursuant to said writ of attachment, seized and took into his posses-

sion certain of his personal property, such as cows, calves, horses, colts, wagons, etc., etc., and that by reason of such seizure, he was deprived of the use of said property for a long time, and greatly injured thereby to his damage, \$400; that he recovered judgment for his costs in the suit by the defendant against him, and that the said plaintiff in that action has not paid to him, the plaintiff in this action, the aforesaid damages sustained by reason of said attachment.

The defendant filed for answer a counter claim, and among other things, alleged that the plaintiff was indebted to him for pasturage for certain stock.

There was evidence showing a lease of certain lands from Barnhardt to Hurd. Regarding the counter claim for pasturage, the court, at the request of the plaintiff, gave the following instructions:

"If you find, from the evidence, that the land on which the plaintiff pastured his cattle is included in the lease from Barnhardt to Hurd, then the defendant is not entitled to recover anything on that item in his counter claim. But if you should find that said land was not included in said lease, then before the defendant can recover anything thereon, you must be satisfied from the evidence that there was a special agreement between plaintiff and defendant for such pasturage."

Regarding the measure of damage, the court, at the request of the plaintiff, charged: "What the use of the property so attached was worth to Hurd during the time he was deprived of it by the writ of attachment is the measure of damage; and in ascertaining the value of such use, you will take into consideration the use he had for the property so attached, and how he could and would have used it had it not been taken from him." Judgment for plaintiff.

Terry, McKinne & Terry, for appellant.

W. L. Dudley, for respondent.

PER CURIAM.

The court charged that the measure of damages was what the use of the property was worth *to the plaintiff* during the

time that he was deprived of it; and that in ascertaining the value, the jury should consider how the *plaintiff could and would have used the property, had it not been taken from him.*

This was substituting a speculative and peculiar measure of damages for the true rule, which, as applied to the case, was what the use of such property could have been procured for—in other words, the market value—and was erroneous.

The sixth instruction, given at the request of plaintiff, was erroneous, in requiring the defendant to prove a special agreement for pasturage on land not included in the lease.

Judgment and order reversed, and cause remanded for a new trial.

[No. 10,330.]

[Filed April 25, 1878.]

PEOPLE vs. JAMES JONES.

CARVING OUT OFFENSES—ROBBERY INCLUDES LARCENY.—Under an indictment for robbery, the defendant may be convicted of larceny.

SAME—INSTRUCTIONS.—The jury may be instructed to find the defendant guilty of larceny, if they entertain a reasonable doubt as to whether the offense be robbery or larceny.

INDICTMENT—ROBBERY.—An indictment for robbery must aver every fact necessary to constitute larceny, with the addition of facts showing force or fear.

From the County Court of San Joaquin County.

Indictment for robbery, from the person of George Kimble, of \$135. The court below was requested to instruct the jury to the effect that they might find the defendant guilty of the crime of larceny, under the indictment, if they had a reasonable doubt as to the use of force. The evidence showed that the prosecuting witness was on the street in the city of Stockton, carrying a washboard in his hands, when one, James Meehan, overtook him and seized the washboard, at the same time striking him with something which knocked him down. While down, Kimble felt Meehan trying to get his hand into the former's pocket, when Kimble shouted, "Police!" As he did so, a person standing near, whom he

recognized as Jones, the defendant, said: "hit him again," or, "give him some more." Kimble lost consciousness, and when he recovered, his purse, containing \$135, was gone. It was also in evidence that Kimble was drunk at the time.

There was some opposing evidence to the effect that Kimble was not struck; that Meehan seized the washboard and snatched the purse from Kimble's pocket at the same instant, and that it was some time after that Kimble discovered his loss, and was accosted by defendant.

S. L. Carter, for appellant.

Hamilton, Attorney-General, for the People.

PER CURIAM.

The court erred in refusing to give the *seventeenth* instruction, which was to the effect, that under the indictment for robbery the jury might find the defendant guilty of a larceny, if they entertained a reasonable doubt as to which of the two offenses he was guilty.

Robbery is larceny committed by violence from the person of one put in fear. "The indictment for robbery charges a larceny, together with the aggravating matter which makes it in the particular instance robbery." (2 Bish. Cr. L. 1158.) In the Penal Code, Sec. 484, larceny is defined: "The * * felonious * * taking * * the property of another." And Sec. 211 of the same Code declares: "Robbery is the felonious taking of personal property in the possession of another, *from his person or immediate presence*, and against his will, accomplished by means of force or fear."

It is obvious from the foregoing definitions that an indictment for robbery must aver every fact necessary to constitute larceny, and more.

The jury may find a defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. (Penal Code, 1159.) And as there was some evidence tending to show that the crime was merely larceny, the defendant had the right to insist on the instruction he requested the court to give.

Judgment and order denying new trial reversed, and cause remanded for a new trial.

[No. 10,299.]

[Filed, April 22, 1878.]

PEOPLE vs. W. W. ROYAL

RAPE—SEDUCTION.—The employment of arts and devices, without violence, by which the moral power of a female is so corrupted that she will offer no resistance, is not sufficient to constitute rape.

SAME—EVIDENCE.—The testimony of medical experts, in a trial for rape, as to the effect of indecent liberties upon the mind of the female, is inadmissible; all such practices are to be classed under the head of *solicitation*, and distinguish the crime of seduction from that of rape.

Appeal from the County Court of Sonoma County.

The indictment charges the defendant with the crime of rape, committed upon the person of one Flora Lester. The charge was brought under Penal Code, § 261, and proceeds upon the three clauses of statute, viz.: 1st. Force and violence. 2d. Threats of bodily harm. 3d. Unconsciousness of the woman at the time.

The defendant produced affidavits tending to show popular prejudice,* and asked successively for a change of venue and for a continuance, which were denied.

The case rested chiefly upon the testimony of the prosecuting witness, and of medical men, summoned as experts, to

* The bill of exceptions in this case presents an example of making a defense under serious but perhaps not unmerited disabilities. Among the incidents operating adversely to the defendant, as gathered from his affidavits upon motion for change of venue and for continuance, are the following:

Upon a prior defective indictment the defendant was about to escape, when the Judge of the court from the bench suggested to the District Attorney a clause of the penal statutes under which an indictment might hold, and the defendant's case was re-submitted to the grand jury. Defendant assigned this as ground for bias of the Judge but failed. Inasmuch as he also deposed that hundreds of citizens had declared their intention to lynch him in case he escaped the law, it may be that the ruling of the court was to defendant's advantage.

On the 4th of July during a public celebration at Santa Rosa, the procession contained a large cage, in which was carried a stuffed tiger, placarded "Royal." The Santa Rosa *Times* expressed the opinion that defendant ought to be lynched, and the Petaluma *Argus* was to the same effect. The Santa Rosa Masonic Lodge held a trial, which resulted in the prompt expulsion of Dr. Royal. Three witnesses, by whom as Royal stated in his affidavit, he would prove that the girl had a bad reputation in the county of her residence, were alleged to have been frightened away by the popular excitement, although there was some evidence to support the theory that they went off at defendant's instance.

On the 5th of July, defendant was shot twice on the Court-house steps by the father of the girl, in the presence of a large number of people, both shots taking effect but not producing serious injury. Defendant succeeded in procuring twenty-six affidavits that he could not have a fair trial, but Mr. Henley was furnished with forty-two to the contrary effect. Both the change of venue and continuance were denied. The exceptions, largely relied on, went to these rulings, but in the opinion, the court confines itself to a consideration of the merits only.—EDITOR.

show the effects upon young women of licentious caresses from men.

Defendant was a medical practitioner at Santa Rosa. He was family physician to a citizen of that city, at whose house the prosecuting witness was temporarily residing. During social visits interchanged between the defendant's family and the family with whom witness resided, the defendant became acquainted with the witness. She was in her sixteenth year; resided in another county; had taken pleasure drives with Mrs. Royal, wife of defendant, and had become the recipient of marked attentions of a familiar kind from the defendant.

On the 29th of March, 1877, at about six o'clock in the evening, defendant drove to the house where Flora was living and invited her to go with him to visit Mrs. Royal. She assented, but they had not proceeded far when defendant changed the course of his horse and drove out upon the Healdsburg road. It was during this drive that the defendant practiced extreme liberties with the person of the young woman, and committed the "manipulation" mentioned in the opinion of the court. During the return trip, defendant ceased from any improper behavior, drove to his office, secured the horse, assisted the girl to alight, and accompanied her up stairs into his office, which was furnished with locks and lounges. There was no evidence of force used beyond the mental effects of defendant's lewd conduct during the drive, which, the witness said, made her dull and stupid. In his office defendant accomplished all his designs, the witness testifying to no physical resistance of any decided character, attributing the fact to her mental faculties being obscured by the occurrences of the evening. Defendant then drove with her to Mrs. Royal's, where they alighted. Flora had some conversation with Mrs. Royal, asked after a book, etc., and afterward defendant took the two women in his buggy to accompany Flora home, where she arrived about nine o'clock. The following day defendant again invited her to ride. She declined, and after defendant had left the house, made such disclosures as led to his prosecution.

The defendant was found guilty and sentenced to fifteen years' imprisonment, from which he appealed.

Barclay Henley, for the People, in an able and eloquent argument, maintained that the mental condition of the girl was the most important element in determining the criminal character of defendant's acts.

W. E. Turner, with him.

J. B. Southard, E. D. Ham, and J. T. Campbell, for appellant.

PER CURIAM.

Against the objection of the defendant, the witness Smith was permitted to testify, that in his opinion as a medical man, the "manipulation" of the person of the prosecutrix on the same day while driving on the public road between Healdsburg and Santa Rosa, and before she accompanied defendant to his office, may have weakened her capacity to resist when the alleged rape was committed. The effect of such "manipulation" upon females, as explained by the witness, is ordinarily "to excite their passions to such an extent as to influence their judgment and mental condition." The expert adds: "If it excited no passion or gave no pleasure, it might affect the intellect or might not—might make some angry and might frighten others. Supposing it excites no passion at all and no pleasurable emotion, it *might have the effect to bewilder her.*"

The foregoing, and more of the same kind of testimony appearing in the record, was inadmissible. The common law judges recognized no such refinement, but referred all improper caresses and indecent liberties to the head of *solicitation*. The homely sense of our ancestors distinguished without difficulty between the *force* which constitutes rape and the blandishments of the seducer.

If such testimony was admissible at all, the jury were authorized to regard it as *evidence* which made *less resistance* sufficient that would in their opinion have been sufficient, except for the testimony in respect to the effect of the alleged "manipulation." That the evidence may have influenced the verdict can not be disputed, and the rule requires of us to reverse a judgment when an improper evidence has been admitted, unless it clearly appears that the evidence errone-

ously admitted could not have had any effect on the action of the jury.

That the testimony of the medical witness did influence the verdict, is made to appear the more distinctly by the *charge* of the court. Portions of the charge suggest to the jury the theory—or at least possibility—that the *will* of the prosecutrix and her capacity of resistance might have been destroyed by some occult influence proceeding from defendant; that her mind might have been “bewildered” or indeed “paralyzed” by some mysterious agency, entirely disconnected from any physical violence or threat of violence. There is no pretense that any drug or noxious substance was employed to render the prosecutrix unconscious, or to produce unsoundness of mind. The portions of the charge of the court referred to, if they had application to any part of the evidence, could only have been understood by the jury as having application to such testimony as that given by the witness Smith; and as an instruction that the law demands less resistance on the part of the female, when erotic passion has been aroused by the solicitations of a suitor, accompanied by improper familiarities, at a period when the amatory passion is supposed to be peculiarly active, than when no such ardent appeal or manipulation has preceded the alleged illicit intercourse.

For example, among other matters, the court charged: “If from all the evidence, you are satisfied that on or about the time alleged, the defendant *by manipulation, art or device, or by other means, so bewildered or overpowered the mind and will of this girl as to render her at the time unconscious of the nature of the act of carnal intercourse, or powerless to resist it, and under those circumstances he had carnal intercourse with her, he is guilty of rape.”*

Such language conveys the notion distinctly that *seduction* may be *rape*; that the employment of any art or device by which the moral nature of a female is corrupted, so that she is no longer able to resist the temptation to yield to sexual desire, will render sufficient less proof of resistance than would otherwise be necessary; that consent thus obtained is

no consent. The proposition entirely overthrows the established law in respect to the offense with which the defendant is charged.

Judgment and order reversed, and cause remanded for a new trial.

[No. 10,336.]

[Filed April 22, 1878.]

PEOPLE vs. WILLIAM E. GREEN.

JURY—VIEW OF PREMISES—PENAL CODE § 1119.—No person, whether by order of the court, or otherwise, can be permitted to show to a criminal jury, when viewing the premises in question, what positions the defendant and witnesses occupied during the commission of an offense.

From the County Court of San Joaquin County.

The appellant was indicted jointly with Emanuel Bargion, Thomas A. Devine, and John Duffy for the crime of robbery. He was separately tried, convicted, and sentenced to imprisonment for life. A motion for a new trial was made on the grounds, among others, that the jury received evidence out of court other than that resulting from a view of the premises.

The witness mentioned in the opinion of the court was a policeman in Stockton, and testified that on the 5th of October, 1877, he saw the defendant, one Burnett, and several others in the back room of the Independence Saloon. Burnett had treated several times, and began to get drowsy. Green made two ineffectual attempts to get his hand into Burnett's pocket, while the others were diverting his attention by various devices. At length the party went into the front room. Burnett stood leaning on the counter, Bargion facing him, and Green behind. Green put his hand in Burnett's pants pocket, and at the same time Bargion struck him in the face, knocking him back into Green's arms. At this point witness and one Collins rushed in and made the arrest. The remainder of the testimony appears in the opinion of the court.

From the judgment, and the orders denying motions for a new trial and arrest of judgment, defendant appealed.

Wesley Minta, James H. Budd, W. M. Gibson, and S. L. Terry, for appellant.

J. A. Hosmer and J. C. Campbell, for the People.

PER CURIAM.

On cross-examination, the witness Nye stated that he and Collins, during all the times that the occurrences he testified to were going on, were in a yard back of the saloon, and the back room was between them and the front room where the bar was. That the partition, over which he couldn't see, ran between the front and back room, and the door in this partition was closed. That the only way he could see what took place in the front room was by looking through an opening in the partition at the end of the counter, about four feet by two, over the ice chest, which was the same height as the counter. They standing at a door leading from the back room to the yard, about sixteen feet from the ice chest.

This testimony was given in answer to questions asked by the defendant's counsel, for the avowed purpose of showing that it was impossible for the witness to have seen what took place in the bar-room while the witness was at the back door.

Mr. Campbell, for the prosecution, asked the court to send the jury, in charge of the witness Nye, to see the Independence Saloon, and that Mr. Nye should show the jury the relative positions of these parties.

Mr. Terry, for defendant, objected to Nye making any explanation to the jury out of court.

The court said: He (Nye) may go and show them (jury) where he stood, and where the parties stood, but not any further.

To Mr. Nye: Mr. Nye, you will go with the jury and show them the position that you occupied during the transaction, and where the other parties were, and where Officer Collins was, and they can judge for themselves after that. There are not to be any explanations or comments made, except to show the jury where these parties were at the time the things occurred.

Mr. Sheriff, you will take charge of the jury.

Mr. Terry, defendant's counsel, excepted to the order of the court.

The jury went to view the premises in charge of the Sheriff, who was first sworn as required by law. This proceeding was erroneous. Section 1119 of the Penal Code provides: "When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the Sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose; and the Sheriff must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into court without necessary delay, or at a specified time."

The action of the court was not only opposed to the letter of the Code, but also to the purpose of the oath required to be administered to the officer who conducts the jury to the place mentioned in the order, and to the principle which gives to a defendant the privilege of being confronted by the witnesses against him.

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

[No. 5,232.]

[Filed April 29, 1878.]

FROST, PLAINTIFF AND RESPONDENT,

VS.

MEETZ, DEFENDANT AND APPELLANT.

FORECLOSURE OF MORTGAGE—FORMAL REPORT OF AMOUNT OF DEFICIENCY NOT NECESSARY TO ESTABLISH A LIEN.—Section 246 of the Practice Act of 1851 did not require any formal report of sale under a foreclose of mortgage, showing in terms the amount of deficiency, nor does the amendment of 1860 require anything more than the return of the sheriff of the amount for which the premises had sold to give the judgment creditor the benefit of a lien on the general real estate of the debtor. It is only necessary that it appear from the sheriff's

return that there is a deficiency of such proceeds and a balance still due, and the judgment shall then be docketed. To ascertain the exact balance is a mere matter of computation and may be made either by the sheriff or clerk.

DEEDS—RECITAL—MISTAKE.—Where a recital in a deed shows that the sale was made in January, 1855, under an execution for a deficiency, seven months before the sale of the mortgaged premises under the decree of foreclosure, in June, 1855, it is apparent that 1855 was inserted by mistake for 1856.

Appeal from the Third Judicial District, Alameda County.

The action is ejectment. Both parties claim under the same source of title—Gideon Aughinbaugh. The plaintiff claims under a conveyance made by Aughinbaugh to one Tinsley in October, 1855. The defendant claims under two execution sales. One had under a judgment recovered against Aughinbaugh by Drexel, Sather & Church, and the other recovered against Aughinbaugh by Samuel Moss. These actions against Aughinbaugh were brought to foreclose mortgages, and the execution sales were made for the purpose of satisfying deficiencies.

The plaintiff urged—1st. That the appeal should be dismissed, because she was not served with notice of intention to move for a new trial in the court below. Affidavits were filed by the appellant showing that the plaintiff appeared at the settlement of the statement on motion for new trial, proposed amendments thereto, and did not then allege the want of proper notice. 2d. That the judgment and sales under them for deficiencies under which the defendant claims title are void, because the sheriff made no formal report of a deficiency; that he should have made a report over his official signature showing the deficiency at the sale; that the execution to make up the deficiency in the Moss case was dated November 29, 1855, and not levied until December, 1855, and that as the deed to Tinsley through whom she claims was executed on the 15th day of October, 1855, no title could pass by a sale under the execution. 3d. That the order of foreclosure was made in June, 1855, and the date of sale for deficiency, as shown by the deed, was —th day of January, 1855.

The defendant introduced the records in the two cases of *Moss vs. Aughinbaugh* and *Drexel, Sather & Church vs. Aughinbaugh*, and contended that the evidence and facts found in

Chapin vs. Broder (16 Cal. 407), where these cases were commented on, show that in the Moss case the deficiency was filed on the 24th day of August, 1855, and that the return on the order of sale showing deficiency is dated July 31, 1855, and is marked filed by the clerk August 24, 1855. That the deficiency in the Drexel, Sather & Church case was reported on July 24, 1855, as stated in *Chapin vs. Broder*. That the transcript shows the return of sale to be dated by the sheriff on the 24th day of July, 1855; but there is no indorsement of filing by the clerk. But the court say in *Chapin vs. Broder* that the report was *filed* the same day.

The court below, on motion for new trial, held: 1st. That the recital in the deed to Moss shows that the land was sold for an alleged deficiency in January, 1855, seven months before the sale of the mortgaged premises under the decree of foreclosure, and that this recital is conclusive as between parties and privies, and *prima facie* as to strangers. It is the sheriff's deed which proves the sale. 2d. The sheriff's deed to Drexel, Sather & Church was not translatable of title, because there was no report of deficiency, even in fact, filed, and therefore there was no judgment for deficiency. The motion for new trial denied.

Defendant appealed from the judgment and order denying a new trial.

Jennett B. Frost, for respondent in *pro per*.

H. H. Haight and Edward R. Taylor, for appellant.

PER CURIAM.

1. The statement and bill of exceptions on motion for a new trial were settled by the Judge of the court below on the 9th day of February, 1876, and on the 31st of March following the motion for a new trial was denied. It is now contended by the respondent that the right to move for a new trial in the court below had been lost, by a failure to give the required preliminary notice of intention to move for such a new trial.

But we think that this objection is not open to the respondent. The statement as settled sets forth (folio 123) that the defendant *had given the notice*—“And the defendant

Meetz having given notice of his intention to move for a new trial," etc., and by this will be intended a notice given in due time and form. Nor is the position of the respondent upon this point aided by a resort to the affidavits found in the printed transcript on file here. For if those affidavits be taken to be part of the record on this appeal, there is found the uncontradicted allegation by the counsel for appellant, that the respondent appeared at the settlement of the statement, proposed amendments thereto, and did not then allege the want of proper notice of intention to move for a new trial, nor object to the settlement of the statement on that ground.

The decision denying the motion for a new trial, made below, does not appear to have proceeded upon the supposed want of notice of intention, but upon the determination of the questions presented by the motion itself. The intentment to be indulged here therefore is that the court below found that the respondent had waived the objection.

2. The judgment and proceeding in *Moss vs. Aughinbaugh* were substantially like those in *Hepburn vs. Chipman*, considered in *Hibberd vs. Smith* (50 Cal. 518), and those in *Drexel, Sather & Church vs. Aughinbaugh*, commented on in *Chapin vs. Broder* (16 Cal. 421).

In the cases referred to it was held, in effect, that the return of the sheriff, showing the sum for which the mortgage premises had been sold, authorized the clerk to issue execution against the general property of the judgment debtor for the balance of the mortgage debt, and that the docket of the judgment, made prior to the *return*, constituted a lien on the general real estate of the defendant from the filing of the *return*.

Much stress was placed in argument upon the circumstances that the record in *Moss vs. Aughinbaugh* contains no formal report of the deficiency, and it is urged that the failure of the sheriff to make the subtraction and report the balance, deprived the judgment creditor of the benefit of his lien on the general real estate of the debtor. But the creation of the lien or its amount did not depend on the action of

the sheriff, whose duty was simply to perform the acts required of him by law.

Section 246 of the Practice Act of 1851, reads: "In an action for the foreclosure or satisfaction of a mortgage of real property, or the satisfaction of a lien or incumbrance upon property, real or personal, the court shall have power, by its judgment, to direct a sale of the property, or any part of it; the application of the proceeds to the payment of the amount due on the mortgage, lien or incumbrance, with costs, and execution for the balance." Prior to 1860, when Section 246 was amended, there was no provision for the docketing of a deficiency, but the docket of the judgment in a mortgage foreclosure had no effect until the return of the sheriff on the order of sale, when a lien attached by reason of the previous docket, for the amount of any balance uncollected by sale of the lands mortgaged. But Section 246 as it stood originally did not require any formal report of sale showing in terms the amount of a deficiency, to be approved by the court, or any such report, nor did the amendment of 1860 require anything more than the return of the sheriff of the amount of which the mortgaged premises had sold. The words of the amendment are: "*If it shall appear from the sheriff's return that there is a deficiency of such proceeds and a balance still due to the plaintiff, the judgment shall then be docketed for the balance,*" etc. Such is the law at present in this respect.

Of course, neither the clerk nor sheriff can adjudge any sum due from a defendant to a plaintiff. The authority of each extends to the mere matter of computation, and it can in no way affect the substantial rights of either party to the action, whether the subtraction is made by the sheriff or clerk. If either of these officers make a mistake in the calculation, the party injured by the error may call the mistake to the attention of the court.

That the figure *five* was inserted by mistake for the figure *six* in the sheriff's deed to J. Mora Moss, is apparent on an inspection of the instrument.

Judgment and order reversed, and cause remanded for a new trial. Remittitur forthwith.

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Current Topics.

JUDGE EUGENE FAWCETT, of the First Judicial District of this State, has submitted for the consideration of the bar the outlines of a plan for the reorganization of the Supreme Court of the State. He says: The serious objections to Judge Heydenfeldt's plan—the cost and delay in carrying causes through two Appellate Courts—the increase in the number of courts with attendant expenses to both State and litigants—the unwieldiness of a Supreme Court of nine Justices—are for the most part obviated by the plan proposed below. The scheme is simple; the present capacity of the court is nearly doubled at a slightly increased expense, and I believe the plan would be acceptable to the sovereigns of the State, who will doubtless insist upon having their say about the judicial as well as the other departments of the government under the proposed new Constitution. But let the plan speak for itself:

1. The judicial power is vested in Supreme, District, and County Courts, substantially as at present (but amalgamating the County and Probate Courts); also in Justices' and Police Courts to be created by the Legislature.
2. Jurisdiction of the Supreme Court, both original and appellate, substantially as at present.
3. The Supreme Court shall consist of six Justices, and shall be divided into two sections of three Justices each. Each of the sections composed of any three of the Justices shall have authority, with the limitations hereinafter provided, to hear and determine appeals to the Supreme Court,

and to exercise the original jurisdiction of the Court; and both sections may sit at the same time, and at the same, or different places, as may be required by the business before the court. All cases necessarily involving the constitutionality of a law shall be reserved for argument before a full bench, and the Justices of either section may for good reason require any other cause to be reserved; and the causes so reserved shall be argued before the full bench only. All causes argued before either section, in which the three Justices are unable to concur, shall be re-argued before the full bench.

4. The Supreme Court shall meet twice a year in full bench, at the State Capital, to hear the cases reserved; and at such sittings five Justices make a quorum; and a majority of those sitting must concur in the judgment—an equal division operating as an affirmance, or as a dismissal, if in original proceedings.

5. At least six terms yearly shall be held by the two sections—two at the State Capital, two at San Francisco, and two at Los Angeles; but the Legislature may change the places of meeting. The Justice holding the oldest commission of all present shall preside at any sitting, whether of the full bench, or of the sections; and if two or more commissions be of the same date the Presiding Justice shall be selected from among them by lot, at the beginning of each sitting.

6. The Justices of the Supreme Court shall be elected from among those learned in the law, and shall hold their offices during good behavior. A Justice may retire after ten years' service, if over sixty years of age or incapacitated by infirmity, on half pay.

The foregoing is to be understood as being merely an outline. I do not claim entire originality for the plan, Alexander H. Stephens of Georgia having proposed, in Congress, a somewhat similar division of the Supreme Court of the United States.

I have proceeded on the theory that for most purposes a tribunal of three Judges is as good as one of five. The

Supreme Court of this State for many years, and at a time when certainly as good work was done as ever in the whole history of the court, was composed of but three Judges. In those times many important decisions were made with the concurrence of but two Judges, which can never be the case under the foregoing scheme—the concurrence of three at least being always required.

The time of the Supreme Court is mainly occupied in hearing causes, and (presumably) in consultations. By dividing the court, its capacity as to these particulars is at once doubled. Probably the entire gain over the present capacity of the bench would be three-fifths.

Add a provision requiring the court to award damages to the respondent in all cases of frivolous appeal, and, I submit, there would be no danger of over-taxing the tribunal, organized as above proposed, for many years to come.

As to the inferior courts, the fewer radical changes made the better. The present system works reasonably well, in the country at any rate. As to the changes required in the city of San Francisco, if any, I would not presume to speak. It is not necessary that the courts of a populous city be organized on the same plan as those of the sparsely settled country.

THE Supreme Court of North Carolina in *Citizens' National Bank vs. Green* (17 Alb. L. J., 329), have decided that property that is the product of, or increase from, exempt property, is not by that circumstance rendered exempt.

THE Supreme Judicial Court of Maine, in the case of *Heins vs. Cargill* (67 Me. 554), holds that an alteration of a note for \$500 to one for \$400 is a material alteration, and if made without the consent of the signer or indorser will constitute a good defense to his liability upon the note.

Supreme Court of California.

APRIL TERM, 1878.

[No. 6,033.]

[Filed April 29, 1878.]

CITY OF STOCKTON, APPELLANT,
vs.
CLARK, RESPONDENT.

STREET ASSESSMENTS—SEALED PROPOSALS—NOTICE.—All proceedings under a notice inviting sealed proposals which did not refer to a diagram and specifications of the proposed work as required by the 27th Section of the Act of March 27, 1872, to re-incorporate the city of Stockton, are invalid, and property is not liable to an assessment under them.

Appeal from the Fifth Judicial District.

This was an action to collect an assessment for improving a portion of Hunter Street, in the city of Stockton.

The case was submitted to the court below upon an agreed statement of facts, and judgment rendered for the defendant. The court passed upon only one of the points made by the defendant in his brief—that in relation to the notice to contractors inviting sealed proposals.

The agreed statement of facts show that the notice was in these words: “Sealed proposals for the performance of the foregoing street work will be received up to one o'clock P. M. of Monday, July 1, 1873, at the office of the City Clerk of the city of Stockton by the Street Committee of the Council of said city, at which time and place such bids as may be received will be opened and considered and the contract awarded to the lowest and best bidder. The work is to be completed on or before the 8th day of August next, and is to be done under the direction of the Street Commissioner, and to be subject to the approval of the Street Committee. Suitable bonds, to be approved by the Committee for the faithful performance of the contract, will be required. The

Committee reserve the right of rejecting any or all bids deemed too high."

J. A. Louttit, for appellant.
W. L. Dudley, for respondent.

PER CURIAM.

The notice inviting sealed proposals did not refer to a diagram and specifications of the proposed work, as required by the Twenty-seventh Section of the Act of March 27, 1872, to re-incorporate the city of Stockton, and for that reason the proceedings are invalid, and the defendant's property did not become liable for the assessment.

Judgment affirmed. Remittitur forthwith.

[No. 6,011.]

[Filed April 29, 1878.]

CITY OF STOCKTON, APPELLANT,
VS.
SKINNER, RESPONDENT.

STREET ASSESSMENT—SURVEY AND DIAGRAM—WHEN MAY BE MADE.—Where a survey, diagram, and specifications have been made by the City Surveyor of work on a certain street, though made without order or authority of the City Council, and filed with the Clerk, a subsequent resolution authorizing and directing the Clerk to re-advertise for sealed proposals for work on the said street to be completed in accordance with the "*plans and specifications therefor now on file in the office of the City Clerk,*" is equivalent in law to an adoption of said survey, diagrams, and specifications, and is tantamount to a prior direction to the City Surveyor to make said survey, diagram, and specifications.

Appeal from the Fifth Judicial District.

This is an action for the recovery of an assessment for certain street work in front of the real estate of defendant Skinner. The action was submitted upon an agreed statement of facts, and judgment rendered for the defendant in the court below. The agreed statement shows that on the 2d day of June, 1873, at a regular meeting of the City Council of the city of Stockton, a resolution of intention was passed to or-

der certain work on Hunter Street in said city, between Fremont and Flora Streets; that Monday evening, June 16, 1873, at half past eight o'clock, was fixed as the time, and the Chambers of the Council the place for the hearing of objections of parties interested in the property to be affected by or fronting on the line of said proposed improvement, and all parties interested notified to appear and make objections to the ordering or doing of said work; that said resolution was published in the Stockton *Daily Independent*; that on the 16th of June a remonstrance from the defendant was received and filed. That said City Council never passed any resolution or order authorizing or requiring or directing any survey or estimate of the proposed work mentioned in this action to be made, nor did they cause any to be made. But the City Surveyor, without any order or authority from said Council, on the 2d day of June, 1873, made a survey of such proposed work, together with certain maps and diagrams, estimates and specifications, relating to said proposed work, which were filed in the office of the City Clerk on the 2d day of June, 1873, with the following indorsement thereon, to-wit: Approved June 2, 1873, and by the City Council ordered filed. H. T. Campton, City Clerk.

That said survey, diagrams, estimates, etc., were not approved by said City Council, unless the filing of the same as above in the office of the City Clerk constitutes an approval.

That the defendant appeared before the Council in person and by his remonstrance on the hearing of the proposition to re-grade, etc., and was heard thereon. That on June 16th a resolution was passed ordering the street work to be done on said Hunter Street; that on June 20th the said resolution, together with notice for sealed proposals was published; that the contract was awarded to one Patrick Donnelly; that said Donnelly refused to enter upon or complete said work, and that on the 20th day of October, 1873, the said City Council in regular session passed and adopted the following resolution: "That the City Clerk be and he is authorized and directed to re-advertise, for the space of ten days, for sealed proposals for the graveling of Hunter Street, etc., said work

to be bid for as a new and entire contract, and to be completed in accordance with the plans and specifications therefor now on file in the office of the City Clerk, etc." That in pursuance of the foregoing, a notice was published for sealed proposals "for the graveling of Hunter Street from Fremont to Flora, said work to be bid for as an entire contract, and to be completed in accordance with the plans and specifications therefor now on file in the office of the City Clerk, etc."

W. L. Dudley, for respondent, argued that the City Council failed to comply with the provisions of Section 26 of the Act re-incorporating the city of Stockton in this: It did not "*cause a survey and estimate to be prepared of the proposed work,*" nor *was any made by order or authority of the Council.*

D. S. Terry and James A. Louttit, for appellant.

PER CURIAM.

The resolution of the City Council of October 20, 1873, admitted to have been duly entered on its journal, was equivalent in law to an adoption of the survey, diagram, and specifications before them, made by the City Surveyor and filed with the Clerk, was tantamount to a prior direction to the City Surveyor to make said survey, diagram, estimates, and specifications.

Judgment reversed, and cause remanded, with an order to the court below to enter a judgment for the plaintiffs upon the admission of the pleadings in connection with the agreed statement of facts. Remittitur forthwith.

[No. 5,773.]

[Filed, April 30, 1878.]

TEMPLE, RESPONDENT, VS. ALEXANDER, APPELLANT.

SHERIFF—ATTACHMENT—JUDGMENT.—Where a Sheriff, by virtue of an attachment, takes possession of property, and a suit in replevin is begun, and he afterward turns over said property to a third party, to be held by said party until a final

judgment, in pursuance of a stipulation to that effect signed by all the parties to both actions, a judgment in *form* might be recovered against the Sheriff in the replevin suit; but there should be added a direction that the enforcement of the judgment against the property of the Sheriff be perpetually stayed.

INTERVENTION—SUBSTITUTION.—Nor is the responsibility of the Sheriff changed by the appearance of new parties (who are the real owners) after the signing of said stipulation, when it appears from the original complaint that the suit was brought for their benefit, and by one claiming to be their representative.

This appearance is by way of *substitution*, and not *intervention*.

Appeal from Seventeenth District, Los Angeles County.

This is an action in replevin, and the complaint alleges, substantially, that on the 28th day of April, 1876, one John Temple, a minor, the son of the plaintiff, was the owner of a certain number of cattle—about ninety head—branded "T," of the value of \$3,000. That the plaintiff had said stock in her possession as the mother of said John Temple, taking care of the same. That at the same time and place, one Lucinda Temple, a minor, and daughter of plaintiff, was the owner of about 230 head of cattle, of the value of \$10,000, and that said cattle were in the possession of plaintiff, as the mother of said Lucinda Temple, and that she was taking care of the same for said Lucinda.

That the defendant is the Sheriff of Los Angeles County, and that as such officer, he did, by virtue of a certain writ of attachment, issued in the suit of *A. B. DeBaker vs. Temple & Workman*, levy upon and take the said cattle into his possession, and still keeps and unlawfully withholds and detains the same, wherefore the plaintiff prays judgment for the possession of said cattle, or for their value and damages.

The defendant filed a demurrer on the ground that the complaint does not state sufficient facts.

On June 10, 1876, John Temple, by his guardian *ad litem*, filed a complaint in intervention, alleging that he is the son of the plaintiff, and a minor, that he is the owner of about 90 head of the cattle now in the possession of the defendant, which cattle were given him by his grandfather, William Workman, deceased, and put into possession of the same on or about 1872, and praying for a judgment in his behalf for the return of the cattle, or their value, \$1,800.

On June 2, 1877, the said John and Lucinda Temple, by their guardian *ad litem*, William Temple, filed an amended complaint in intervention, and allege that they are the owners of 467 head of cattle, marked, respectively, "T" and "L T;" that said John Temple is the owner of 120 head thereof; that said Lucinda is the owner of 347 head thereof, of the brand of "L T;" that the defendant, acting as Sheriff, by virtue of an attachment in the suit of *DeBaker vs. Temple & Workman*, took them into his possession; that the said cattle were in the possession of plaintiff as their agent; and praying for judgment for possession or value.

To this the defendant filed a demurrer for want of sufficient facts, for want of legal capacity to sue, and that the complaint is vague, indefinite, and uncertain.

On February 5, 1877, defendant filed his answer, denying all the allegation of the complaint, and of the amended complaint in intervention.

On May 31, 1877, G. E. Long filed a complaint in intervention as assignee in bankruptcy of the estate of F. P. F. Temple, one of the firm of Temple & Workman, claiming the property attached.

On May 31, 1877, the defendant filed an answer, stating that he is Sheriff, etc.; that the property attached and described in the complaint is the property of said Temple & Workman; that Spence and Freeman, as assignees of said Temple & Workman, commenced an action claiming said property; and that thereafter, on 15th day of May, 1876, by an agreement in writing between the plaintiff and intervenor and Baker and Spence & Freeman, he (the defendant) was directed to turn over said property to said Freeman & Spence to abide the result of said action, and in pursuance of said agreement did so deliver them.

The court below found that the cattle were the property of said John and Lucinda Temple, and were in their possession, to-wit: in the possession of the plaintiff as their guardian, and gave judgment for the cattle or their value, \$5,064; and further found that a stipulation was entered into on the 15th day of May, 1876, by and between all the parties to the action

at that date; that the property attached should be held by Freeman & Spence, subject to a final judgment; and that afterward Freeman & Spence sold said property, and had not accounted for the proceeds.

The argument, upon a rehearing, was confined to the question "whether a judgment should be entered against Freeman & Spence, or against the Sheriff, or either of them."

Thom & Ross, for appellant.

V. E. & F. H. Howard and Wm. Temple, for respondent.

Brunson & Eastman, for Freeman & Spence.

PER CURIAM.

Had the action of A. M. W. de Temple against the Sheriff proceeded to judgment without the appearance of other parties in the controversy, it is clear that while she might have recovered a judgment *in form* against the Sheriff for the return of the cattle in controversy, she could not have enforced such a judgment against him. The stipulation of May 15th, united in all to the then parties to the action, was intended to remove the property from the custody of the Sheriff and place it in that of keepers selected by the parties themselves; and the effect of the stipulation, followed by a delivery of the property pursuant to its terms, was equivalent to a turning over of the property, by consent, to the keeping and control of the parties to the action themselves, in which case it could hardly be claimed that the Sheriff was still to account for its value.

2. Nor do we think that the *intervention*, so called, of John and Lucinda Temple, subsequently made in the cause, operated a change of responsibility of the defendant, Sheriff, in that respect. The stipulation was still permitted to remain without objection from any quarter, and the custody of the property provided for by it was not altered or disturbed. The appearance of the new parties, John and Lucinda Temple, was not by the way of *intervention*, though it was so denominated, but in reality by way of substitution. The action had been originally brought by A. M. W. de Temple, their mother, who did not pretend to claim for herself, but

only as the representative of her children, John and Lucinda, and as having the custody of the cattle as their property. When, therefore, the children, by their guardian *ad litem*, appeared upon the record as parties litigant, they were but substituted for the then plaintiff, A. M. W. de Temple, who became thereby superseded and practically dismissed from further participation in the case as a party thereto. As substitutes for her, and as being her successors upon the record, the new parties took up the controversy in the condition in which they found it, and subject to the terms of the stipulation referred to.

It results, from this view, that the judgment in favor of John Temple and Lucinda Temple, in form entered against the defendant, was correct, but there should have been added thereto a direction that the enforcement of the judgment against the property of the defendant be perpetually stayed.

Judgment reversed, and cause remanded for further proceedings in accordance with the opinion, including the appropriate disposition of the property or its proceeds.

[No. 6,001.]

[Filed April 29, 1878.]

CREIGHTON, APPELLANT, vs. EVANS, RESPONDENT.

RIPARIAN OWNERS—DIVERSION OF WATER—DAMAGES.—Where a party diverts water flowing in a natural channel, and devotes a portion to his own use, without averring that he is a riparian owner, it is proper to instruct the jury to find against him for nominal damages, even though no actual damage had been suffered. Without such an averment, and no other right appearing from the record, he would not be entitled to divert the water for any purpose; and an instruction to the effect that he was entitled to water for domestic use, in such quantity as not to damage riparian owner, is erroneous.

Appeal from the Thirteenth Judicial District, County of Tulare.

The complaint alleges, and it is admitted by the pleadings that the plaintiff was the owner of a large tract of land

through which a natural running stream of water known as Elk Bayou ran, and that the defendants constructed a dam and ditch and diverted one-third of the waters of said stream to their place, one-half mile distant, and used the same for irrigation, and other useful purposes.

The action was brought to recover damages, and a perpetual injunction restraining defendants from maintaining the dam and diverting the water.

Defendant denied that any damage resulted to plaintiff.

The court instructed the jury at the request of the plaintiff as follows: "All the jury have to do in the case is to ascertain the amount of damages to be recovered by the plaintiff. If they believe his injury to be so trivial as not to be capable of definite compensation, then they will find in his favor for nominal damages only as for one dollar or for one cent. But if the jury believe that the plaintiff has sustained any damage or injury they must find for the plaintiff for such an amount as he has been damaged."

The court at the request of the defendant gave the jury the following instructions: "If the jury find from the evidence that the acts of the defendant in diverting a small portion of the waters of Elk Bayou was for a useful purpose, such as domestic purposes and distinguished from irrigation, and that defendant left a sufficient quantity of water flowing in said Elk Bayou for the use of plaintiff, such as to water his stock and for domestic purposes, and that the said plaintiff has not been injured or damaged, then the jury will find for the defendant."

Of its own motion the court instructed the jury as follows: "That this is an action for damages brought by the plaintiff against the defendant. The defendant admits that he diverted a portion of the water mentioned in the complaint, but claims that plaintiff has not suffered any damages by such diversion. The court instructs you that the plaintiff is entitled to at least nominal damages, if you are satisfied that defendant used such water for irrigating purposes, and diverted the same from the natural channel of the stream by means of a ditch, though the plaintiff may not have suffered any actual damages."

The jury found that the plaintiff had sustained no damages, and gave a verdict in favor of defendants.

Atwell & Bradley, for appellant.

E. J. & E. D. Edwards, for respondents.

PER CURIAM.

It is admitted by the pleadings that the water of Elk Bayou flowed in its natural channel through the plaintiff's land, and that the defendant diverted a portion of the water to his own land for purposes of irrigation, and other purposes. It is not averred that he is a riparian owner, and as such entitled to use any portion of the water. There is nothing in the record to indicate that the plaintiff was entitled to divert any portion of the water, and the court properly instructed the jury that the plaintiff was entitled to recover at least nominal damages, even though he had suffered no actual damage. But, at the request of the defendant, the court also instructed the jury that if the defendant diverted a portion of the water for a useful purpose—such as, for example, for domestic use—and that enough of water was left in the stream for the use of the plaintiff for watering his stock and for domestic purposes, and if the plaintiff was not damaged by the diversion, the verdict should be for the defendant. This was not only contradictory to the first instruction, but erroneous in matter of law. So far as appears from the record before us, the defendant was not entitled to divert the water for any purpose, and the plaintiff was entitled to at least nominal damages.

Judgment and order reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 5,968.]

[Filed April 29, 1878.]

CHIDESTER, RESPONDENT, vs. CONSOLIDATED PEOPLE'S DITCH CO., APPELLANT.

DAMAGES—NEGLIGENCE—REMOTE AND PROXIMATE CAUSE.—In actions for negli-

gence the damages to be recovered are only those of which the negligent act is the *proximate cause*. (Civil Code, Sec. 3333.)

INSTRUCTIONS.—An erroneous instruction is not cured by a proper one if both go to the jury; they are contradictory, and it is impossible to determine on which of them the jury acted. (*People vs. Campbell*, 30 Cal. 312; *Brown vs. McAllister*, 38 Cal. 573; *People vs. Anderson*, 44 Cal. 65.)

Appeal from the Thirteenth Judicial District, County of Tulare.

This is an action to recover damages alleged to have been caused to plaintiff's land of the water of a certain ditch overflowing its banks, which said overflow, it is alleged, was caused by the negligent manner in which said defendant managed said ditch.

The answer of the defendant denied all the material allegations of the complaint. The jury returned a verdict for plaintiff for \$600. The reversal by the court in the following opinion is based upon an error by the court below in its fourth instruction at the request of plaintiff to the jury. The instruction is substantially set forth in the opinion.

The first instruction given at the request of the defendant is—"If the defendant has been guilty of negligence, such negligence will not entitle the plaintiff to a verdict unless the evidence shows that the plaintiff has suffered damages from such negligence as the *approximate* and direct result of such negligence."

Brown & Daggett, for appellant.

W. W. Cross, and Atwell & Bradley, for respondent.

PER CURIAM.

By the fourth instruction given at the request of the plaintiff, the court instructed the jury that for any injury to the lands of the plaintiff caused by the overflow of the waters entering the defendant's ditch, "resulting either directly or *remotely* from the negligence of the defendant in not keeping the same in good repair, or in the manner of its use while under defendant's exclusive control, defendant is responsible for such damages as he has sustained by reason thereof."

The instruction is erroneous, in so far as it declares the defendant to be responsible for damages resulting "*remotely*"

from the defendant's negligence. The law is well settled that in actions for negligence the damages to be recovered are only those of which the negligent act is the *proximate cause*. The maxim applicable to such actions is "*causa proxima, non remota spectatur.*" (Sherman & Redfield on Negligence, Secs. 9-595, and cases there cited. See also Civil Code, Sec. 3333.) If it be claimed that the error in this instruction was cured by the first instruction given at the request of the defendant, the answer is that the two instructions are in this particular contradictory, and it is impossible to determine on which of them the jury acted. (*People vs. Campbell*, 30 Cal. 312; *Brown vs. McAllister*, 38 Cal. 573; *People vs. Anderson*, 44 Cal. 65.)

Judgment reversed and cause remanded for a new trial. Remittitur forthwith.

Supreme Court of the United States,
OCTOBER TERM, 1877.

THE NATOMA WATER AND MINING COMPANY,
PLAINTIFF IN ERROR, vs. BUGBEY, DEFENDANT IN ERROR.

[In Error to the Supreme Court of California.]

An actual settler upon a legal subdivision of the 16th section, and who had thereon a dwelling-house and agricultural and other improvements at the time of a survey of said lands, and who made no claim under the pre-emption laws of the United States, may abandon it and afterward purchase it from the State, whose title becomes absolute from the date of the survey, as against one claiming under the Act of Congress of July 26, 1866, passed after the survey.

Sherman vs. Buick (93 U. S. 209), construed.

Mr. Chief Justice WAITE delivered the opinion of the court.

This was an action of ejectment brought by Bugbey, the defendant in error, against the Natoma Water and Mining Company, plaintiff in error, to recover possession of a part of the south half of section 16, township 10, north of range

8 east, Mount Diablo base and meridian, in the State of California. Bugbey claimed title by grant from the State, and the company under the Act of Congress of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," (10 Stat. 244), and the Act of July 29, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes." (14 Stat. 251.)

The decision of the Supreme Court of California having been against the title set up by the company, this writ of error was brought. The facts affecting the federal question in the case are as follows:

In 1851 the company commenced the construction of a canal upon the unoccupied and unsurveyed public lands of the United States for the purpose of supplying water to miners and others. This canal was completed at large expense in April, 1853, and the premises in controversy are included within its limits. By the Act of March 3, 1853 (10 Stat. 244), Congress provided for the survey of the public lands of California, and granted sections 16 and 36 to the State for school purposes. By Section 7 of this Act it was provided, "that where any settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made on the sixteenth and thirty-sixth sections, before the same shall be surveyed, * * * other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the Act of Congress, approved May 20, 1826. * * *." (4 Stat. 179.)

The survey of the lands in controversy was completed May 19, 1866, and the plats deposited in the United States Land Office for the district June 16, 1866. At that time Bugbey was an actual settler upon the legal subdivision of the section sixteen in which the premises are situated, and had thereon a dwelling-house, and agricultural and other improvements. He made no claim under the pre-emption laws of the United States. Other persons were also in possession of other portions of the section. The Act of 1853 required (Sec. 6), that "where unsurveyed lands are claimed by pre-

emption, the usual notice of such claim shall be filed within three months after the return of the plats of the surveys to the Land Offices." On the 28th of September, 1866, the Register of the United States Land Office certified to the State Land Office that no claim had been filed to this section sixteen, except the pre-emption of Hancock, which was afterward abandoned.

Sec. 9 of the Act of July 26, 1866 (14 Stat. 253), is as follows: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed * * *." The company has brought itself within the provisions of this section, if at the time of the passage of the Act the United States held title to the lands.

On the 22d of April, 1867, Bugbey purchased the portion of the section on which the premises in controversy are situated, from the State of California, and took a patent. The company does not in any manner connect itself with this title or with that of any other occupant of the section previous to the survey.

In *Sherman vs. Buick* (93 U. S. 209), it was decided that the State of California took no title to sections 16 and 36, under the Act of 1853, as against an actual settler before the survey, claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. In such a case the State must look for its indemnity to the provisions of Section 7 of the Act. As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys, and if the settler failed to assert his claim or to make it good, the rights of the State became absolute. The language of the court is (p. 214), "These things [settlement and improvement under the law] being found to exist when the survey

ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and it being shown in the proper mode to the proper officer of the United States, the right of the State to the land was gone, and in lieu of it she had acquired the right to select other land agreeably to the Act of 1826."

In that case the controversy was between the settler, who had perfected his title from the United States, and a purchaser from the State. Here the company does not claim under the settler's title, but seeks by means of it to defeat that of the State, and thus leave the land in a condition to be operated upon by the Act of July 26th. The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute as of May 19, 1866, when the surveys were completed. The case stands, therefore, as if at that date the United States had parted with all interest in and control over the property. As the Act of July 26th was not passed until after that time, it follows that it could not operate upon this land in favor of the company.

This disposes of the only federal question in the record, and the judgment is, consequently, affirmed.

U. S. Supreme Court Abstracts.

EVIDENCE.

Parol testimony to vary written instrument: showing absolute deed to be a mortgage.—The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That can not be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the objects and purposes of the parties in executing and receiving the instrument. Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a

loan, or for any other object not apparent on its face. These purposes and objects are always considered by a court of equity, and constitute the principal grounds of its jurisdiction, which is exercised to give effect to them, or to restrain them so as to prevent fraud or oppression, and to promote justice. Accordingly, a deed, absolute in form, and recorded as such, may be shown to be a mortgage by parol testimony. Decree of Supreme Court of District of Columbia reversed. *Peugh, appellant vs. Davis.*

Burden of Proof—Negative Allegation. — When a negative allegation involves a criminal neglect of duty, official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it, for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged. Accordingly, in an action against a collector of customs duties to recover for an alleged illegal exaction of duties, *held*, that it devolved upon the plaintiff to make out his case by showing the illegality complained of. Judgment of U. S. Circuit Court, S. D. New York. *Arthur, plaintiff in error, vs. Unkart.* Opinion by HUNT, J.

TRUSTS.

When court will not remove trustee: mutual ill-will between trustee and cestui que trust. — Complainant brought her bill in chancery to have defendant removed from his place as trustee in a deed made to secure to her the payment of a bond for \$38,000, which was in defendant's possession, and which she prayed might be delivered to her. Defendant asserted a lien on the bond for \$5,000 for legal services rendered to complainant. *Held*, (1) that while in a case where the trustee has a discretionary power over the rights of the *cestui que trust*, and has duties to discharge which necessarily bring him into personal intercourse with the latter, a state of mutual ill-will or hostile feeling may justify a court in removing the trustee, it is not sufficient cause where no such intercourse is required and the duties are merely formal and ministerial, and no neglect of duty or misconduct is es-

tailed against the trustee. Decree of Supreme Court of District of Columbia reversed. *McPherson vs. Cox.* Opinion by MILLER, J. WAITE, C. J., dissented.

2. *Contract as to payment of lawyer for services when not champertous nor void under statute of frauds.*—A contract to pay a specified sum of money to a lawyer for his services in a suit concerning real estate out of the proceeds of said land when sold by the client, if recovered, is not champertous, because he neither pays costs nor accepts the land or any part of it as his compensation. Nor is it void under the statute of frauds because not in writing, for it *may* be performed within the year. Ib.

3. *Lien of attorney on securities in his hands for services.*—The land being recovered in the action in which the attorney was employed, and sold by the owner for \$38,000, for which a bond was taken and left with the attorney, he has a lien on the bond for his fee, both by express contract and by reason of the lien which the law gives an attorney on the papers of his client left in his hands, for any balance due him for services. Ib.

4. *Attorney also trustee: lien of, on trust securities.*—Where, under the circumstances mentioned, the client brings a bill in chancery to remove the attorney from his position as trustee in a deed to secure the purchase-money and for a delivery of the bond, it is the duty of the court to decide on the existence and amount of the lien set up by the attorney in his answer, and to decree the delivery of the bond on payment of amount of the lien, if one be found to exist. Ib.

Practice: failure to file cross-bill.—Though the defendant, by neglecting to file a cross-bill, can have no decree for affirmative relief, it is proper that the court should establish the conditions on which the delivery of the bond to complainant, according to the prayer of the bill, should be made, and require it to be done on that condition being complied with. Ib.

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Current Topics.

A QUESTION involving the construction of Section 1469 of the Code of Civil Procedure arose in the matter of the *Estate of Christina Feyhl*, decided during the April term of the Supreme Court.

Christina Feyhl and G. A. Feyhl were husband and wife and had two children. They were afterward divorced and the care and custody of the children were given to the husband. Said Christina died leaving a small estate which was set aside by the Probate Court to the said children. Curtis & Clunie, judgment creditors of the deceased, contested the petition to set aside the estate to the children, and appealed from the order. Judgment affirmed.

IT will be observed that all the decisions with a few exceptions of the Supreme Court, in reversal of the judgment of the court below have been written, thus narrowing the unwritten opinions that are of any special or peculiar interest to quite a small number.

We are examining them, however, and such as may be worthy of notice will be given.

We would be glad to have any subscriber direct us to any case that may have passed under their observation involving questions of interest, and we will note them.

IN *White vs. University of California*, the Secretary of the Interior holds that in the selection of land in California in view of school sections claimed to have been lost in place, the State Locating Agent, State Surveyor-General and Local

Land Officers, must certify that their respective records do not show that a former selection has been made by the State for the same land claimed to have been lost, prior to July 23, 1866, and that to the best of their knowledge and belief no such selection has been made. That the warrants issued under the State law of May 3, 1852, for 320 acres each, of the 500,000 acre grant under the Congressional Act of April 4, 1841, disposed of that portion of the said government grant covered thereby. The provisions of the State law of April 23, 1858, regulating the disposal of the unsold portions of said 500,000 acre grant, are not applicable to parties who have purchased said warrants under the 4th section of the Act of April 23, 1858, but 320 acres of land can be located for any one person. An attempted location in excess of that amount by an agent is illegal and void.

THE new rules of the Supreme Court adopted April 29, 1878, and to take effect July 8, 1878, have just been issued. We will procure and forward a copy to any subscriber desiring it.

WE call attention to our abstract of all the laws of a general nature passed by the last Legislature, and a table of Sections of the Political Code which have been added or amended.

In this connection we acknowledge the favor extended by the Hon. F. J. French in furnishing us the signatures as soon as issued from the press.

In this issue will be found the case of *Edwards vs. Kearzy*. The court discuss the federal question in this case, and conclude that State exemption laws, so far as they affect contracts made before their enactment, impair the obligation of contracts and violate the Federal Constitution, and are therefore void.

This opinion seems to be in opposition to the decisions by the State Courts, and therefore will prove to be very important.

Supreme Court of California.

APRIL TERM, 1878.

[No. 5,943.]

[Filed May 13, 1878.]

SANTA CRUZ RAILROAD CO., APPELLANT,

vs.

SCHWARTZ, RESPONDENT.

CONTRACTS.—Where a party subscribed a "prospectus" of a railroad company for shares of capital stock, contemplating an organization only after securing subscriptions for one hundred and fifty thousand dollars, a subsequent organization effected without his consent, when subscriptions for only one hundred and thirty thousand dollars had been obtained, operates to release him from further liability.

Appeal from the Twentieth Judicial District.

This is an action to recover the sum of \$500 alleged to be due upon the defendant's liability for an unpaid assessment on his subscription for 5 shares, \$100 each, of the capital stock of the plaintiff. In May, 1873, a written prospectus was circulated setting forth the purpose of organizing and constructing a railroad in Santa Cruz County, and defendant subscribed this prospectus and agreed to take 5 shares of the capital stock, which was before the incorporation or organization of said company. This "prospectus" set forth, among other things, that as soon as subscriptions to the amount of \$150,000 were secured, the company shall be organized and the construction of the road commenced.

The findings of the court below show that at the date of the organization, not more than \$130,000 of subscriptions to the capital stock had been secured, and gave judgment for the defendant. The defendant refused to take any part in the organization.

Chas. B. Younger, for appellant.

Craig & Kittredge, for respondent.

PER CURIAM.

The "prospectus" to which the signature of the defendant was obtained contemplated an organization of the proposed corporation only after securing subscriptions for one hundred and *fifty* thousand dollars. The organization was, however, subsequently, and without the consent of the defendant, effected when subscriptions for only one hundred and *thirty* thousand dollars had been obtained. This was a clear departure from the scheme set forth in the "prospectus" to which the defendant had become a party, and it operated to release the defendant, at his option, from proceeding further in the business. Judgment affirmed.

[No. 5,942.]

[Filed May 13, 1878.]

SANTA CRUZ RAILROAD CO. vs. TOWNE.

The facts of this case are precisely those of the case of *Santa Cruz Railroad Company vs. Schwartz*, just decided, and, upon the authority of that case, the judgment rendered for the defendant below must be affirmed. So ordered.

Supreme Court of the United States,

OCTOBER TERM, 1877.

EDWARDS vs. KEARZY.

1. **NORTH CAROLINA EXEMPTION LAW UNCONSTITUTIONAL.**—The Act of the Legislature of North Carolina, passed August 22, 1868, exempting personal property and the homestead of a debtor from sale under execution: *Held*, unconstitutional and void as to debts contracted before its passage.
2. **THE REMEDY SUBSISTING IN A STATE** when and where a contract is made, and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void.

In error to the Supreme Court of North Carolina. The facts appear in the opinion.

Mr. Justice SWAYNE delivered the opinion of the court.

The Constitution of North Carolina, of 1868, took effect on the 24th of April in that year. Sections 1 and 2 of Article X, declare that personal property of any resident of the State, of the value of five hundred dollars, to be selected by such resident, shall be exempt from sale under execution or other final process issued for the collection of any debt; and that every homestead and the buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the buildings used thereon, owned and occupied by any resident of the State, and not exceeding in value one thousand dollars, shall be exempt in like manner from sale for the collection of any debt under final process.

On the 22d of August, 1868, the Legislature passed an act which prescribed the mode of laying off the homestead, and setting off the personal property so exempted by the Constitution. On the 7th of April, 1869, another act was passed, which repealed the prior act, and prescribed a different mode of doing what the prior act provided for. This latter act has not been repealed or modified.

Three several judgments were recovered against the defendant in error—one on the 15th of December, 1868, upon a bond dated the 25th of September, 1865; another on the 10th of October, 1868, upon a bond dated February 27, 1866; and the third on the 7th of January, 1868, for a debt due prior to that time. Two of these judgments were docketed, and became liens upon the premises in controversy on the 16th of December, 1868. The other one was docketed and became such lien on the 18th of January, 1869. When the debts were contracted for which the judgments were rendered, the exemption laws in force were the acts of January 1, 1854, and of February 16, 1859. The first-named act exempted certain enumerated articles of inconsiderable value, and "such other property as the freeholders appointed for

that purpose might deem necessary for the comfort and support of the debtor's family, not exceeding in value fifty dollars at cash valuation." By the act of 1859, the exemption was extended to fifty acres of land in the county, or two acres in a town, of not greater value than five hundred dollars.

On the 22d of January, 1869, the premises in controversy were duly set off to the defendant in error as a homestead. He had no other real estate, and the premises did not exceed a thousand dollars in value. On the 6th of March, 1869, the Sheriff, under executions issued on the judgments, sold the premises to the plaintiff in error, and thereafter executed to him a deed in due form. The regularity of the sale is not contested.

The act of August 22, 1868, was then in force. The acts of 1854 and 1859 had been repealed. (*Wilson vs. Sparks*, 72 N. C. 211.) No point is made upon these acts by the counsel upon either side. We shall, therefore, pass them without further remark.

The plaintiff in error brought this action in the Superior Court of Granville County, to recover possession of the premises so sold and conveyed to him. That court adjudged that the exemption created by the Constitution and the act of 1868 protected the property from liability under the judgments, and that the sale and conveyance by the Sheriff were, therefore, void. Judgment was given accordingly. The Supreme Court of the State affirmed the judgment. The plaintiff in error thereupon brought the case here for review. The only federal question presented by the record is, whether the exemption was valid as regards contracts made before the adoption of the Constitution of 1868.

The counsel for the plaintiff in error insists upon the negative of this proposition. The counsel upon the other side, frankly conceding several minor points, maintains the affirmative views. Our remarks will be confined to this subject.

The Constitution of the United States declares that "no State shall pass any * * * law impairing the obligation of contracts." A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be

done, or shall not be done. The lexical definition of *impair* is "to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate."—Webster's Dict. *Obligation* is defined to be "the act of obliging or binding; that which obliges; the binding power of a vow, promise, oath, or contract," etc. —Id. The word is derived from the Latin word *obligatio*, tying up; and that from the verb *obligo*, to bind or tie up; to engage by the ties of a promise or oath, or form of laws; and *obligo* is compounded of the verb *ligo*, to tie or bind fast, and the preposition *ob*, which is prefixed to increase its meaning." (*Blair vs. Williams* and *Lapsley vs. Brashears*, 4 Litt. 65.)

The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. "Want of right and want of remedy are the same thing." (1 Bac. Abr. tit. Actions in General, letter B.)

In *Von Hoffman vs. Quincy* (4 Wall 552), it was said: "A statute of frauds embracing pre-existing parol contracts, not before required to be in writing, would affect their validity. A State declaring that the word *ton* should, in prior as well as subsequent contracts, be held to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedness may be extinguished by a process of bankruptcy, would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy." It can not be doubted, either upon principle or authority, that each of such laws would violate the obligation of the contract, and the last not less than the first. These propositions seem to us too clear to

require discussion. It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement. (*Von Hoffman vs. Quincy, supra; McCracken vs. Hayward*, 2 How. 612.)

In *Greene vs. Biddle* (8 Wheat. 92), this court said, touching the point here under consideration: "It is no answer that the acts of Kentucky now in question are *regulations of the remedy* and not of *the right to the lands*. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they *overturned* his rights and interests." "One of the tests that a contract has been impaired is that *its value has by legislation been diminished*. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation--dispensing with any part of its force." (*Planters' Bank vs. Sharp et al.*, 6 How. 327.) It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account.

These rules are axioms in the jurisprudence of this court. We think they rest upon a solid foundation. Do they not cover this case, and are they not decisive of the question before us? We will, however, further examine the subject.

It is the established law of North Carolina that stay laws are void, because they are in conflict with the National Constitution. (*Jacobs vs. Smallwood*, 63 N. C. 112; *Jones vs. Crittenden*, 1 Car. Law, 385; *Barnes vs. Barnes*, 8 Jones, 366.) This ruling is clearly correct. Such laws change a term of the contract by postponing the time of payment. This impairs its obligation by making it less valuable to the creditor. But *it does this solely by operating on the remedy*. The contract is not otherwise touched by the offending law. Let us suppose a case. A party recovers two judgments—one against A, the other against B—each for the sum of fifteen

hundred dollars upon a promissory note. Each debtor has property worth the amount of the judgment and no more. The Legislature thereafter passes a law declaring that all past and future judgments shall be collected "in four equal annual installments." At the same time another law is passed which exempts from execution the debtor's property to the amount of fifteen hundred dollars. The court holds the former law void and the latter valid. Is not such a result a legal solecism? Can the two judgments be reconciled? One law postpones the remedy, the other destroys it—except in the contingency that the debtor shall acquire more property—a thing that may not occur, and that can not occur if he die before the acquisition is made. Both laws involve the same principle and rest on the same basis. They must stand or fall together. The concession that the former is valid cuts away the foundation from under the latter. If a State may stay the remedy for one fixed period, however short, it may for another, however long. And if it may exempt property to the amount here in question, it may do so to any amount. This, as regards the mode of impairment we are considering, would annul the inhibition of the Constitution, and set at naught the salutary restriction it was intended to impose.

The power to tax involves the power to destroy. (*McCulloch vs. Maryland*, 4 Wheat. 430.) The power to modify at discretion the remedial part of a contract is the same thing.

But it is said that imprisonment for debt may be abolished in all cases, and that the time prescribed by a statute of limitations may be abridged. Imprisonment for debt is a rule of ancient barbarism. (Cooper's *Justinian*, 658; 12 Tables, Tab. 3.) It has descended with the stream of time. It is punishment rather than a remedy. It is right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute book. But upon the power of a State, even in

this class of cases, see the strong dissenting opinion of WASHINGTON, J., in *Mason vs. Hale* (12 Wheat. 370).

Statutes of limitation are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified. If the period limited be unreasonably short and designed to defeat the remedy upon pre-existing contracts, which was part of their obligation, we should pronounce the statute void. Otherwise we should abdicate the performance of one of our most important duties. The obligation of a contract can not be substantially impaired in any way by a State law. This restriction is beneficial to those whom it restrains, as well as to others. No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice. The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect.

In *Bronson vs. Kenzie* (1 How. 311), the subject of exemptions was touched upon, but not discussed. There a mortgage had been issued in Illinois. Subsequently the Legislature passed a law giving the mortgagor a year to redeem, after a sale under a decree, and requiring the land to be appraised, and not to be sold for less than two-thirds of the appraised value. The law was held to be void in both particulars as to pre-existing contracts. What is said as to exemptions is entirely *obiter*, but coming from so high a source, it is entitled to the most respectful consideration. The court speaking through Chief Justice TANEY, said: "A State may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized

community as properly belonging to the remedy, to be executed or not by every sovereignty, according to its own views of policy and humanity." He quotes with approbation the passage which we have quoted from *Greene vs. Biddle*. To guard against possible misconstruction, he is careful to say further: "Whatever belongs merely to the remedy may be altered according to the will of the State, *provided the alteration does not impair the obligation of the contract*. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. *In either case it is prohibited by the Constitution*." The learned Chief Justice seems to have had on his mind the maxim "*de minimis*," etc. Upon no other ground can any exemption be justified. "Policy and humanity" are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it.

Where the facts are undisputed, it is always the duty of the court to pronounce the legal result. (*Merchants' Bank vs. The State Bank*, 10 Wall. 604.) Here there is no question of legislative discretion involved. With the constitutional prohibition, even as expounded by the late Chief Justice, before us on one hand, and on the other the State Constitution of 1868, and the laws passed to carry out its provisions, we can not hesitate to hold that both the latter do seriously impair the obligation of the several contracts here in question. We say, as was said in *Gunn vs. Barry* (15 Wall. 622), that no one can cast his eye upon the new exemptions thus created without being at once struck with their excessive character, and hence their fatal magnitude. The claim for the retrospective efficacy of the Constitution or the laws can not be supported. Their validity as to contracts subsequently made admits of no doubt. (*Bronson vs. Kenzie, supra*.)

The history of the National Constitution throws a strong light upon this subject. Between the close of the war of the revolution and the adoption of that instrument, unprecedent-

ed pecuniary distress existed throughout the country. The discontents and uneasiness, arising in a great measure from the embarrassment in which a great number of individuals were involved, continued to become more extensive. "At length two great parties were formed in every State, which were distinctly marked, and which pursued distinct objects with systematic arrangement." (5 Marshall's Life of Washington, 75.) One party sought to maintain the inviolability of contracts, the other to impair or destroy them. "The emission of paper money, *the delay of legal proceedings*, and the suspension of taxes, were the fruits of the rule of the latter whenever they were completely dominant." (Ib.)

"The system called justice was, in some of the States, iniquity reduced to elementary principles." * * * "In some of the States creditors were treated as outlaws. Bankrupts were armed with legal authority to be persecutors, and by the shock of all confidence society was shaken to its foundations." (Fisher Ames' Works, ed. of 1859, p. 120.) "Evidences of acknowledged claims on the public would not command in the market more than one-fifth of their nominal value. The bonds of solvent men, payable at no very distant day, could not be negotiated but at a discount of thirty, forty, or fifty per cent. per annum. Landed property would rarely command any price; and sales of the most common articles for ready money could only be made at enormous and ruinous depreciation. State Legislatures, in too many instances, yielded to the necessities of their constituents and passed laws by which creditors were compelled to wait for the payment of their just demands on the tender of security, or to take property at a valuation, or paper money falsely purporting to be the representative of specie." (Ramsey's Hist. U. S. 77.) "The effect of these laws interfering between debtors and creditors were extensive. They destroyed public credit and confidence between man and man, injured the morals of the people, and in many instances insured and aggravated the ruin of the unfortunate debtors, for whose temporary relief they were brought forward." (2 Ramsey's Hist. S. C. 429.)

Besides the large issue of continental money, nearly all the States issued their own bills of credit. In many instances the amount was very large. (2 Phillips' Hist. Amer. Paper Money, 29.) The depreciation of both became enormous. Only one per cent. of the "continental money" was assumed by the new government. Nothing more was ever paid upon it. (Act of August 4, 1790, § 4, 1 Stat. 140; 2 Phillips' Hist. American Paper Currency, 294.) It is needless to trace the history of the emissions by the States.

The treaty of peace with Great Britain declared that "the creditors on either side shall meet with no lawful impediment to the recovery of the full amount in sterling money of all *bona fide* debts heretofore contracted." The British minister complained earnestly to the American Secretary of State of violations of this guaranty. Twenty-two instances of laws in conflict with it in different States were specifically named. (1 Amer. State Papers, 195, 196, 199 and 237.) In South Carolina "laws were passed in which property of every kind was made a legal tender in payment of debts, although payable according to contract in gold and silver. Other laws installed the debt, so that the sums already due only a third, and afterward only a fifth, was securable in law." (2 Ramsey's Hist. S. C. Ib.) Many other States passed laws of a similar character. The obligation of the contract was as often invaded after judgment as before. The attacks were quite as common and effective in one way as in the other. To meet these evils in their various phases the National Constitution declared that "no State should emit bills of credit, make anything but gold and silver coin a legal tender in payment of debts, or pass any law * * * impairing the obligation of contracts." All these provisions grew out of previous abuses. (2 Curtis' Hist. of the Const. 366. See, also, the Federalist, Nos. 7 and 44.) In the number last mentioned Mr. Madison said that such laws were not only forbidden by the Constitution, but were "contrary to the first principles of the social compact and to every principle of sound legislation."

The treatment of the malady was severe, but the cure was

complete. "No sooner did the new government begin its auspicious course than order seemed to arise out of confusion. Commerce and industry awoke and were cheerful at their labors, for credit and confidence awoke with them. Everywhere was the appearance of prosperity, and the only fear was that its progress was too rapid to consist with the purity and simplicity of ancient manners." (Ames' Sup. 122.) "Public credit was re-animated. The owners of property and holders of money freely parted with both, well knowing that no future law could impair the obligation of the contract." (2 Ramsey, *supra* 433.)

Chief Justice TANEY, in *Bronson vs. Kenzie* (*supra* 218), speaking of the protection of the remedy, said: "It is this protection which the clause of the Constitution now in question mainly intended to secure."

The point decided in *The Dartmouth College vs. Woodward* (4 Wheat. 518), had not, it is believed, when the Constitution was adopted, occurred to any one. There is no trace of it in the Federalist nor in any other contemporaneous publication. It was first made and judicially decided under the Constitution in that case. Its novelty was admitted by Chief Justice MARSHALL, but it was met and conclusively answered in his opinion.

We think the views we have expressed carry out the intent of contracts and the intent of the Constitution. The obligation of the former is placed under the safeguard of the latter. No State can invade it and Congress is incompetent to authorize such invasion. Its position is impregnable, and will be so while the organic law of the nation remains as it is. The trust touching the subject with which this court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither nonfeasance nor misfeasance on our part.

The importance of the point involved in this controversy induces us to re-state succinctly the conclusions at which we have arrived and which will be the ground of our judgment.

The remedy subsisting in a State when and where a contract is made and is to be performed is a part of the obliga-

tion, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution, and is, therefore, void.

The judgment of the Supreme Court of North Carolina is reversed, and the cause will be remanded with directions to proceed in conformity to this opinion.

Notes of Cases.

In the case of *Harrison vs. Collins et al.*, decided by the Supreme Court of Pennsylvania on the eighth of last month, defendants employed one Connor to move certain machinery from a railroad depot to their premises. He was paid a specified sum per day for his work, and his assistants who were employed by him were also paid by the day. In doing the work he left open a coal hole in the sidewalk in front of defendants' premises, and plaintiff fell therein, injuring himself, for which he brought this action. The court held that if Connor was the mere agent or servant of the defendants in doing the work they would be liable for his negligence in leaving the coal hole open, but if his employment was an independent one, they would not be liable. This is in accordance with the distinction recognized in numerous cases in England and this country. It is well settled that employers not personally interposing or giving directions respecting the manner of the work, but contracting with a third person to do it, are not liable for a wrongful or negligent act in the performance of the contract, if what was agreed to be done was lawful. (*Gray vs. Hubble*, 32 L. J. Rep. N. S.; *Hillard vs. Richardson*, 3 Gray, 349; *Blake vs. Ferris*, 5 N. Y. 48; *Painter vs. Mayor of Pittsburg*, 10 Wright, 213.) The fact that the contractor is paid by the day does not necessarily destroy the independent character of his employment. (*For-*

sythe vs. Hooper, 11 Allen, 419; *Corbin vs. America Mills*, 27 Conn. 274.) If one renders service in the course of an occupation representing the will of an employer only as to the result of his work, and not as to the means by which it is accomplished, it is independent employment. (See *Pack vs. Mayor of New York*, 8 N. Y. 222; *Barry vs. City of St. Louis*, 17 Mo. 121; *Mercer vs. Jackson*, 54 Ill. 397.)

The Supreme Court of Ohio in *Matter of Victor* (31 Ohio St. 206), passes upon a peculiar question, and one which has not heretofore been presented before the courts, namely, whether to render valid commutation by the executive of the punishment of a convicted and sentenced criminal, the criminal must accept or acquiesce in such commutation. The court hold that the commutation is presumed to be for the culprit's benefit, and is valid without any action on his part.

An occupier of land may maintain an action against any one who allows filth or other noxious things produced on the latter's land to interfere with the reasonable enjoyment of his land by the former. Therefore, if any one, by an artificial erection on his own land, cause water, even though only arising from natural rainfall, to pass into his neighbor's land, he is liable to an action at the suit of the person so injured. This is, however, subject to the principle that the owner of land holds his right to the enjoyment thereof, subject to any annoyance arising from the natural user by his neighbor of his land, as in the case of an adjoining mine owner. (*Hurdman vs. The Northeastern R. R.* English Ct. Apps., March 1, 1878.)

AN ABSTRACT OF THE
Statutes of California of a General Nature,
PASSED AT THE
Twenty-second Session of the Legislature,
1877-8.

[All Code Amendments, and also all Acts of the Legislature of a private, local or special character, are omitted from this abstract.]

[The dates indicate the time at which these statutes take effect.]

[Abstract of Amendments to the Civil Code and Code of Civil Procedure, *vide* LAW JOURNAL, No. 9, page 178.]

Ch. 5.—Chinese Immigration. At the next State election ballots to contain the words: "For Chinese immigration," or "Against Chinese immigration." Secretary of State to certify returns to Governor, who shall forward a memorial to the President and Vice-President of the United States, to the Cabinet, Senate, House of Representatives, and Governors. (Dec. 21, 1877.)

Ch. 11.—Street Railroad Fares. No charge for one trip to exceed five cents per passenger in cities of more than 100,000 inhabitants. Violation gives an action to person over-charged for a forfeiture in sum of \$250. (Jan. 1, 1878.)

Ch. 37.—Trespasses by Hunters. Act of March 23, 1876 (Stat. 75-6, ch. 318, p. 408), amended so that section eighth shall read: Section 8. Section three of this Act shall not apply to the counties of Los Angeles, San Diego, Sutter, Del Norte, El Dorado, Colusa, Yuba, Humboldt, Amador, Tuolumne, San Luis Obispo, Plumas, Lassen, Siskiyou, Modoc, Shasta, Trinity, Sierra, and Placer. (Jan. 25, 1878.)

Ch. 54.—Special Elections. At any special election copies of the Great Register used at preceding general election shall be used. Certain regulations prescribed in relation thereto. (Feb. 9, 1878.)

Ch. 67.—Orphan and Abandoned Children. Act of March 7, 1874 (Stat. 73-4, ch. 199, p. 297), section one amended to read as follows: Section 1. It shall be the duty of the officers or managers of each and every orphan asylum in this State to publish in January, April, July, and October in each year, in some newspaper of general circulation published in the county where such asylum is situated, a notice giving: 1. The name, if known; 2. The age, as near as may be; 3. The sex; and 4. Such other descriptions as would lead to identification of each child received into such asylum, either as an orphan or an abandoned child, since the last quarterly publication of a like notice. Such notice must be published at least four times if in a weekly, and at least ten times, consecutively, if published in a daily newspaper. (Feb. 15, 1878.)

Ch. 70.—Agricultural Societies. Act of March 12, 1859 (Stat. 59, ch. 110, p. 104), so amended as that section third shall read as follows: Section 3. The general prudential and financial affairs of such society shall be entrusted to a board of managers, consisting of a president and six directors—four of whom shall constitute a quorum to do business—to be elected at the annual meeting of such society. The board of mana-

gers shall, at its first meeting after their election, be divided by lot into three equal portions, omitting the president, one portion to continue in office one year, one portion two years, and one portion three years; one-third of the number, together with the president, to be elected at each annual meeting thereafter; the directors to hold office for three years after the expiration of the term of office for which their predecessors were by lot so appointed to serve. The board of managers may, in the absence of the president, choose one of its other members as temporary chairman. They shall elect a secretary and treasurer—not members of the board—prescribe their duties, and fix their pay. (Feb. 15, 1878.)

Ch. 112.—Justices' Fees. Amendatory of Act of April 4, 1870 (Stat. 69-70, ch. 467, p. 677). Amending Act of March 5, 1870 (Stat. 69-70, ch. 144, p. 148). (March 1, 1878.)

Ch. 130.—To Regulate the Price of Gas. In cities having a population of 100,000 or more, Supervisors to fix the price of gas. Illuminating power to be not less than sixteen-candle power. The rate fixed in no case to exceed \$3 per thousand feet. Mayor to appoint a Gas Inspector, with certain duties imposed. Penalties provided for violation of the terms of this Act by gas companies. (March 4, 1878.)

Ch. 137.—Vignette Ballots. State Central Committees of political parties may adopt a ticket vignette as a distinctive heading. Size of vignette regulated. Copy to be filed with County Clerk. Imitations and frauds to be misdemeanors. Certain matter may be added to tickets besides that provided in Political Code, section 1191. (May 6, 1878.)

Ch. 153.—Artesian Wells. Flowing artesian wells not provided with means to prevent flow of water declared nuisances. Misdemeanor; finable not less than \$10 or more than \$50. (July 1, 1878.)

Ch. 191.—To prohibit Piece Clubs and Extortion from Candidates. All assessments to be among candidates for office voluntarily. Payment, except by voluntary contribution fixed by candidates' meeting, to be a misdemeanor. Asking or receiving from candidate any money or other thing for expenses to be a misdemeanor. Applies only to San Francisco. (March 14, 1878.)

Ch. 266.—Free Libraries and Reading Rooms. Incorporated towns authorized to levy a tax of not exceeding one mill on the dollar to establish free libraries and reading rooms. Municipal authorities to appoint trustees. Special regulations as to San Francisco. Libraries already existing may be turned over on terms specified in this Act to municipal authorities to be used in the free library. (March 18, 1878.)

Ch. 308.—Amends Political Code, section 767, repeals section 768, and provides for appointment by the Governor of a reporter of the decisions of the Supreme Court, to hold office for four years from appointment. First appointment to take effect the first Monday in May, 1877 (78?). (March 21, 1878.)

[In accordance with the foregoing, the Governor has appointed HON. G. J. CARPENTER, of El Dorado County, as Supreme Court Reporter, who will hold office for four years.]

Ch. 337.—County and Probate Courts of Modoc County to be held on the third Mondays of February, April, June, August, and November. (March 23, 1878.)

Ch. 352.—Oleomargarine not to be sold as butter, or kept on hand without branding the package "Oleomargarine." Penalty: imprisonment not less than 50 or more than 200 days, or by fine not less than 50 or more than 200 dollars, or both fine and imprisonment. (March 26, 1878.)

Ch. 415.—An Act to establish a scale for the measurement of logs. Adopts Spaulding's Table as the standard of measurement. (March 28, 1878.)

Ch. 449.—Selling and keeping of syrup containing muriatic or sulphuric acid or glucose, or any other coloring substance, a misdemeanor. Penalty: imprisonment

not exceeding 6 months, or fine not exceeding 500 dollars, or both. (March 29, 1878.)

Ch. 450.—Any officer or agent of a corporation making a false report, tending to increase the market price of stock, shall be deemed guilty of a felony. Penalty: imprisonment not exceeding 2 years, or fine not exceeding 5,000 dollars, or both. Applicable only to corporations whose stock is listed at a stock board. (May 28, 1878.)

Ch. 480.—Amends Political Code, section 1225, so as to require voter to announce the street of his residence if in an incorporated city.

Section 1226. In incorporated city, the judge of election must announce residence of voter before depositing ballot, and clerk must record the same.

Section 1227. No person allowed to vote whose name is not on the precinct register.

Section 1228. Judge to write "voted" upon the register opposite the name.

Section 1094. Board of Supervisors may order a re-registration.

Section 1113. Board of Supervisors may order township or precinct registers to be prepared and distributed. (May 29, 1878.)

Ch. 481.—Creates a Board of Bank Commissioners. (May 15, 1878.)

Ch. 484.—During thirty days after arrival at destination a lien shall exist upon logs cut and hauled, in favor of logger or laborer. Verified claim to be filed in Recorder's Office within twenty days after completion of work. Suit to be commenced to foreclose in five days. Lien not to extend beyond the county. (March 30, 1878.)

Ch. 490.—Constitutional Convention. Election to be held on the third Wednesday of June, 1878. Delegates to be 152 in number, and to meet at Sacramento 28th of September, 1878, 12 m. Constitution to be submitted to election on first Wednesday of May, 1879. (March 30, 1878.)

Ch. 491.—Division Fences. Act of March 9, 1878 (Stat. 75-6, ch. 172, p. 175), amended and lawful division fences defined. (March 30, 1878.)

Ch. 520.—An Act to Protect Children. Prohibits admission of minors under the age of sixteen years to saloons, dance houses, and concert rooms; also provides penalty for permitting children to beg. Vagrant children to be arrested. Minors under sixteen years not to be confined with adult criminals. (March 30, 1878.)

Ch. 521.—An Act Relating to Children. Penalties provided for suffering children to be employed in or disposed of for certain enumerated exhibition purposes, and immoral uses. (March 30, 1878.)

Ch. 535.—Agents having the possession of goods or documents of title may make valid pledges of the same to secure *bona fide* advances. Unauthorized pledge by agent in *mala fide*, and for his own benefit, shall be a felony. (May 29, 1878.)

Ch. 544.—County and Probate Courts of Merced County to be held on the first Mondays of April, August, and December. (May 1, 1878.)

Ch. 561.—An Act to define co-operative business corporations and to provide for the organization and government thereof. (April 1, 1878.)

Ch. 576.—Supplemental to an Act entitled, "An Act to regulate the practice of medicine in the State of California," approved April 3, 1876 (Stat. 75-6, ch. 518, p. 792). (April 1, 1878.)

Ch. 598.—Creates 23d Judicial District, in and for the City and County of San Francisco, and defines the boundaries of the 3d and 12th Judicial Districts. (April 15, 1878.)

Ch. 601.—"Municipal Court of Appeals for the City and County of San Francisco." (April 1, 1878.)

Ch. 607.—Warehouse and Wharfinger Receipts. No receipts to be issued unless the goods are in store *bona fide* at the time. No second receipt to be issued while a first receipt is outstanding. Warehouse man, etc., shall not sell, incumber, ship, or transfer goods for which a receipt is outstanding without assent of the holder indorsed upon receipt. Warehouse receipts shall be of two classes—negotiable and

non-negotiable. Non-negotiable receipts to be printed in red across the face, "non-negotiable." No liability for fire, provided reasonable care be used. Violation to be a felony; penalty not exceeding five years, or fine of \$5,000, or both. (May 31, 1878.)

Ch. 609.—One year from the passage of this act given for redemption of all lands heretofore sold for taxes and purchased by the State. (April 1, 1878.)

Ch. 613.—Certificates of Stock. Tax upon issuance of. Secretary of every corporation to collect ten cents in coin for each certificate issued. Quarterly returns to be made to tax collector, except in San Francisco, where the returns and payments shall be made to the license collector. Penalties provided for violations and a false return to be deemed perjury. (April 1, 1878.)

Ch. 641.—Railroad Fares and Freights. (April 1, 1878.)

[The provisions of this act are of such length and intricate detail as to render it impracticable to bring it within the scope of this abstract.]

Ch. 650.—Clerk of the Supreme Court to make an analytical index of all cases since the beginning, showing what action was had thereon. The index to be kept at San Francisco and to be open to public inspection. (April 1, 1878.)

Ch. 673.—Disinterment and the removal of the remains of deceased persons prohibited without a permit from the board of health, or health officer, or from the mayor. (May 2, 1878.)

A TABLE OF SECTIONS OF THE POLITICAL CODE,

AMENDED OR ADDED AT THE TWENTY-SECOND SESSION OF THE

Legislature of California, 1877-8.

157	440	596	767	1912	1962	2085	2468	3019	3572
181	441	602	791	1913	1968	2086	2469	3020	3617
199	455	611	800	1917	1969	2087	2470	3024	3696
266	456	612	909	1918	1970	2094	2527	3025	3713
267	471	616	1053	1921	1973	2095	2536	3026	3747
333	472	617	1055	1922	1974	2097	2548	3028	3764
334	484	618	1094	1925	1975	2099	2552	3031	3766
335	485	619	1113	1926	1976	2100	2567	3033	3816
343	486	620	1225	1927	1984	2107	2568	3034	3829
384	499	621	1226	1928	1985	2111	2872	3035	3857
386	500	622	1227	1930	1990	2114	3008	3061	3858
397	513	634	1228	1932	2006	2140	3009	3074	3862
417	526	642	1576	1936	2007	2351	3010	3077	3866
418	528	684 rep.	1617	1937	2018	2430	3013	3079	3868
419	531	751	1746	1938	2021	2457	3014	3081	3928
420	532	752	1770	1941	2027	2458	3015	3083	3951
424	536	753	1775	1942	2028	2464	3016	3335	4047
438	538	754	1790	1943	2029	2466	3017	3337	4083
439	595	756	1793	1944	2076	2467	3018	3489	

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No. 16.

Current Topics.

DELEGATES at large to the Constitutional Convention are to be elected in a manner somewhat unusual and not as yet generally understood. We quote below a clause of the act providing for a Constitutional Convention which relates to the election of delegates at large. Thirty-two delegates, eight from each district, are to be voted for throughout the entire State, and their election will depend by no means upon the vote cast in their own Congressional Districts. For example, if A, a resident at large in the First Congressional District, receives only one solitary vote in his own district, but afterward is found to have received a plurality of votes throughout the State over his seven competitors, severally, then A is to be declared elected.

The last clause of subdivision third of section fourth, chapter 490, statutes of 1877-78, page 762, provides as follows: "The persons receiving the highest number of votes at such election shall be elected, except in the case of persons voted for as delegates at large. Of the persons so voted for as delegates at large, the eight persons, residents of any one Congressional District, who shall have received a plurality of votes over all other persons, severally, who reside in the same Congressional District, shall be declared elected such delegates at large."

THE question raised and determined by our Supreme Court in the case of *Wood vs. Orford* (No. 5,726), filed during the July term, 1877, and briefly reported in the JOURNAL, is one of so much practical importance that we are forced to again allude to it; and especially is this necessary since there re-

mains a doubt in the minds of many that the court has ever passed upon the question presented by the record in that case.

The record presents two points of contest. 1. The ability of a married woman to contract generally (in this case to make a promissory note), and 2. The liability of a second husband for the debts of a wife contracted before marriage.

The record shows that the suit is upon a promissory note made by the defendant, Mary J. Orford, February 4, 1875, while the wife of one Fogg. She subsequently, and before this action was brought, became the wife of the defendant, Robert Orford.

The only defense set up in the answer is the coverture of the defendant, Mary J. Orford, at the time of the execution of the note.

Judgment was given below upon the complaint and answer against both defendants, and both appealed from the judgment.

There was no allegation in the complaint that the note was made in respect to any specific property, or that the consideration of the note was for money that was used in the protection or improvement of the wife's separate property, or of the community property. There is nothing in the record to show that either the husband or wife possessed property of any character. The issue was one of ability on her part to create a personal pecuniary obligation. Such is shown by the briefs filed in the case.

The attorneys for the plaintiff say: "The question presented by the appeal is, whether a married woman could at the time when this note was executed (February 4, 1875), bind herself personally by an instrument for the payment of money."

Again: "We do not call in question the doctrine of the wife's incapacity at common law, nor claim that before the revision of the case she could contract except with special reference to her separate estate. The single proposition before the court is whether these rules have been abrogated by the Code, in existence when the contract sued upon was made."

The attorneys for the defendant say: "The question at issue is of the greatest importance to society. It is no less than this—whether or not that ancient and beneficent rule, which declared the contracts of married women void at law, and permitted them to be enforced against her property only, in the *forum of conscience*, has been in this State entirely overthrown."

Again: "The facts of this case are few and simple. The defendant was a married woman when she signed the promissory note sued on. It does not on its face express an intention on her part to charge her separate estate. The complaint does not allege that the consideration of it was obtained for the benefit of such estate. It is a simple complaint on the note."

The plaintiffs' attorneys say further, that she could bind herself personally for the payment of money "precisely as if she were *feme sole*," citing sections 1556, 167; as revised, 171, 158 Civil Code.

"The Code has provided for this subject of the rights and liabilities of married women, and is the only law that can be invoked in their determination." (Secs. 4-20 Civil Code.)

"The common law disabilities of married women are removed by the fact of this legislation, and there is no restriction whatever imposed by the Codes. On the contrary, the power of the wife to create a personal pecuniary obligation is expressly recognized both by the elimination from section 167 of the prohibition, and also by sections 171, 1556 Civil Code."

We have only cited enough of the arguments of counsel (which are elaborate and forcible) to show the precise issue before the court.

The judgment of the court below was affirmed as to the defendant, Mary J. Orford, but not as to the other defendant. There can remain no doubt by those cognizant of the facts shown by the record in this case as to the extent of the decision by the court. This opinion seems to be in keeping with other decisions made by the court touching the powers of married women to contract. In *Parry vs. Kelley* (1 S. F.

Law Journal), it was held that while the mortgage of a wife of the community property creates no lien it is not absolutely void ; and any after-acquired title inures to the mortgage as security for the debt.

Clearly the object of the court has been to announce the principle that the powers of married women to contract generally under the Code are only restricted by the express statutes. It is much to be regretted, however, that our court failed to prepare a more complete opinion in this case whereby not a *shadow* of doubt could remain as to its extent and meaning, inasmuch as the question involved is of great importance to the community.

PETITIONS for rehearing have been granted by the Supreme Court in the following cases : *Hagar vs. Spect*, *Winter vs. Belmont Mining Co.*, *Dowd vs. Clark*, *Zeimwaldt vs. Sacramento City R. R. Co.*, *Snow vs. Kimmer* ; and denied in the following : *Thompson vs. Corpstein*, *Billings vs. Drew*, *Seale vs. Supervisors*, *Brady vs. King*, and *Hershey vs. Dennis*.

In *Mutual Life Insurance Co. vs. Wilcox* (17 Alb. L. J.), decided by United Circuit Court for the Northern District of Illinois, it was held that where a New York Life Insurance Company was required by its charter to invest its capital and income in mortgages or real estate in New York State, or in United States or New York State stocks, and it loaned money on an individual note, the maker of the note could not set up that the note was invalid by reason of the company having no authority under its charter to make the loan.

Supreme Court of California.

APRIL TERM, 1878.

[No. 4,150.]

[Filed May 1, 1878.]

HEINLEN, RESPONDENT, VS. MARTIN ET AL., APPELLANTS.

POWER OF ATTORNEY—MARRIED WOMEN.—A power of attorney executed by a married woman in 1864, without her husband uniting in its execution, is void.

TENANCY IN COMMON—OUTER, WHAT IS.—The relation of tenants in common having been established, a finding that the defendants took possession of the land, "and have ever since retained possession of the same, and excluded the plaintiff from the same and every part thereof," is an express finding of an ouster; and not being attacked on motion for new trial, is conclusive, and renders the defendants liable for rents and profits or use and occupation.

PRACTICE AND PLEADING.—*Query:* By the affirmance of the judgment, does the court hold that the finding as to the contract not set forth in the complaint is material and relevant, and among the issues in the cause?—[EDITOR.]

Appeal from Third Judicial District, County of Santa Clara.

The complaint alleges that on August 25, 1866, Jose Maria Arguello, Josefa Arguello, Concepcion Arguello, Jesus Cervantes Arguello, Josefa Ballardi Arguello, and Domingo Arguello, were the owners of the legal title and estate of one undivided eleventh of the Rancho Santa Teresa, and that on said 25th of August, 1866, an action was commenced by one Senter and others against one Bernal and the said Arguellos, and the plaintiff in this action and the defendants Martin and Rogers, whereby said rancho was sought to be partitioned.

That on the 30th day of November, 1867, an interlocutory decree was made adjudging among other things that the said Arguellos were jointly the owners of an undivided $\frac{57}{967}$ part of said rancho subject to any claim of the said Heinlen or Martin.

That on the 27th day of May, 1868, a final decree was entered, setting apart to Domingo Arguello in severally a certain described portion of said rancho. That on the 4th day

of August, 1864, said Domingo Arguello, Josefa Arguello, Jesus Maria Arguello, Concepcion Arguello, Jesus Cervantes Arguello, Josefa Ballardi Arguello de Camerena, and Ramon Camerena, signed, made, and delivered to one Jesus Cervantes a written instrument and power and letter of attorney in the Spanish language, and sufficient for that purpose, by which they authorized and empowered said Jesus Camerena, for them and in their names, to sell and convey all the said undivided interest of each in said rancho, and that by said power and letter of attorney they empowered and authorized the said attorney to substitute, as their attorney, with power to sell and convey and to make contracts for the sale of said undivided interests in said rancho. Said letter of attorney, with the translation into the English language, is hereto annexed as "exhibit A," and made a part of this complaint.

That said power of attorney has never been revoked. That on the 8th day of January, 1866, the said Jesus Camerena, by instrument in writing, substituted one Augustus D. Splivalo, and that on the 2d day of January, 1867, the said Splivalo contracted to convey, and did sell and convey, to one Aguoyo all the interests of the said Arguellos, and the said Aguoyo paid to Splivalo, as attorney for said Arguellos, \$5,000 as the consideration of said sale. That on the 15th day of March, 1867, the said Aguoyo sold to the plaintiff herein all of said undivided eleventh part of said rancho for the consideration of \$5,000.

The complaint further alleges that on the 3d day of January, the defendant Martin fraudulently procured a conveyance of an undivided one-sixth of said rancho from said Domingo Arguello, and that Martin had full notice of plaintiff's rights. That on the 4th day of July, 1867, the defendants fraudulently procured a deed from the said Arguellos to the remaining five-sixths of said rancho, and with notice of plaintiff's rights. That afterward, through fraudulent representations, the defendants were put into possession of said land, excluding the plaintiff therefrom and praying judgment for said lands and \$10,000 rents and profits.

The defendants filed their answer denying every allegation

of the complaint, and by way of cross-complaint averred that the said Arguellos and Josefa Ballard Arguello de Camerena and her husband Ramon Camerena by an instrument in writing, bearing date November 8, 1866, authorized and empowered the said Domingo Arguello to sell their interest in said rancho.

That the said Domingo did, on the 31st day of December, 1866, for himself and on behalf of said Arguellos, contract to sell all their interest in said rancho to defendants for the price of \$8,000. That on January 2, 1877, a deed was properly executed and acknowledged, conveying one-sixth (Domingo's interest) to Martin for \$1,333 33. That pursuant to said agreement to sell the land, Arguellos did, on the 4th of July, 1877, sell to the defendants the five-sixths of the undivided interest in said rancho.

The cross-complaint charges a conspiracy on the part of the plaintiffs to defraud them, etc., and prays that the deeds to Heinlen be declared fraudulent and void.

The plaintiffs denied the allegations of the cross-complaint. The defendant demanded a jury, which was refused, because the action was an equitable one.

The court below found as facts that the said Arguellos were the owners of said land on August 4, 1864; that at that date a valid power of attorney was made by them to Camerena, and has not been revoked; that he substituted Splivalo; that after said substitution, to-wit: On the 10th day of May, 1866, Splivalo, as attorney in fact for said Arguellos, made a written agreement with the plaintiff to sell and convey to said plaintiff the interest of said Arguello for the sum of \$4,500, \$2,250 to be paid at the execution of the agreement, and the remainder when the title should be clearer. The said agreement was signed by the Arguellos, by their attorney Splivalo, and also by Heinlen. That Heinlen entered into possession under this agreement.

That on the 2d day of January, 1867, Heinlen tendered to Splivalo the remainder due under the contract of May 10, 1866, and Splivalo refused to accept it.

That thereafter said Splivalo, as attorney in fact for the

Arguellos, executed a written conveyance to one Aguoyo to the interests of said Arguellos for the consideration of \$5,000. That afterward, on 15th day of March, Aguoyo, being informed of the claim of Heinlen, delivered to Heinlen his deed and the deed of Splivalo to him, and in consideration Heinlen paid to Splivalo the further sum of \$2,750, and the said Splivalo received it and repaid Aguoyo the \$5,000 paid by him. That the said Splivalo still retains the money for his principals.

That at the time of the execution of the deeds to themselves, mentioned in their cross-complaint, the defendants knew of the power of attorney and the substitution of Splivalo, and of the contract between Splivalo and Heinlen, and of the deed from Splivalo to Aguoyo.

That the defendants have retained possession of said lands since November 27, 1868, and excluded the plaintiff from the same and every part thereof.

From these facts the court adjudges: that the defendants hold as trustees for Heinlen, and is entitled to the conveyance of the legal title to same and order, the defendants to execute a good and sufficient deed to said Heinlen, and that the plaintiff recover the sum of \$10,000 for use and occupation.

The defendants in their brief on a rehearing, state as chief errors: 1. That the cause of action stated in the complaint is one of purely legal cognizance and defendants were entitled to a trial by jury. That the alleged power of attorney constitutes no part of the complaint and was improperly attached, and even though it were a part of the complaint it could not change the nature of the action. 2. There was no proof of the execution or delivery of the power of attorney, or of the substitution. It is not shown that the attorney in fact was present at the execution, or that the notary before whom it was executed was directed to deliver a copy to him, or that it was delivered by those executing it. 3. Neither the finding nor the judgment are supported or justified by the complaint. 4. The finding regarding the contract of May 10, 1866, is erroneous, not being within the issues in the

cause. 5. The defendants can not be required to account for rents and profits. They owned the interest of Mrs. Camerena and were tenants in common and entitled to the possession of the whole with those claiming the remaining five-sixths.

Fred. E. Spencer and Wm. Matthews, for respondent.
Houghton & Reynolds, for appellant.

PER CURIAM.*

The argument on the rehearing has failed to convince us that there was any error in the opinion heretofore delivered in the cause, in respect to the proposition therein discussed. But at the last argument it was contended, that the ninth finding of fact, to the effect that on or about the 15th day of March, 1867, the plaintiff paid to Splivalo, as attorney in fact for the Arguellos, the sum of two thousand seven hundred and fifty dollars to complete his contract of purchase, is not supported by the evidence. But the point is not well taken. On his examination in chief, the witness Splivalo was asked this question: "Did you receive from Heinlen the balance, that is to say, \$2,750, to make up the whole amount of \$5,000?" To which he answered: "I did." In answer to another question, whether he had offered to pay a portion of this money to Domingo Arguello, he replied: "When John Heinlen laid \$2,750 on my desk, I started to separate \$833 33, telling him (Domingo Arguello) to sit down and make me a receipt therefor, which he refused to do, and left the office." He was then asked, "What became of the \$2,750? Has that been retained in your possession till this time?" To which he replied, "I received the money, and at the request of C. T. Ryland I deposited it in the French Bank." He further testified that the deposit was made in the name of Ryland, who was then Heinlen's attorney, and that the money yet remains in the bank to Ryland's credit; that at the time of the deposit a pass-book, in which the deposit was entered, was received from the bank, which was in the nature of a certificate of deposit, and that the pass-book was deposited by

* This opinion is rendered after a rehearing.

Ryland and Splivalo in another bank, subject to their joint order, and it yet remains there. The evidence contains no other explanation than this of the transaction. It is not shown why the money, after it was paid to Splivalo, was deposited in Ryland's name, nor, except by inference, if at all, that Heinlen was in any way privy to the arrangement as to the deposit. On this evidence the court below found that the money was paid to Splivalo by Heinlen, and we are not prepared to say that the evidence did not justify the finding.

We held on the former hearing, and are still of the opinion, that the power of attorney to Camerena was void as to Josefa Ballardi Arguello de Camerena, on the ground that she was a married woman when she executed it, and that her husband did not unite in executing it. The plaintiff therefore acquired no equitable title to her undivided interest in the premises in controversy; and by a subsequent conveyance that interest vested in the defendants, who thereby became tenants in common with the plaintiff; and as such entitled, under the conveyance from said Josefa, to one undivided sixth part of the said premises, while the plaintiff was entitled to an undivided interest of five-sixths thereof. The relation of tenants in common having thus been established between the parties, the defendants contend that there was no proof of an ouster by the defendants prior to the commencement of the action, and consequently that they can, in no event, be held accountable for rents and profits, or use and occupation, prior to that time. But in the twelfth finding the court finds that on the 27th day of November, 1868, the defendants took possession of the land, "*and have ever since retained possession of the same, and excluded the plaintiff from the same and every part thereof.*" This is an express finding of an ouster; and it was not attacked on the motion for a new trial, on the ground that it was not justified by the evidence. It is, therefore, conclusive on the defendants.

The judgment is affirmed, except in so far as it awards to the plaintiff the undivided interest formerly held by Josefa Ballardi Arguello de Camerena in and to the premises described in the complaint, and the value of the use and occu-

pation of the said interest, and in these particulars the judgment is reversed, and the cause remanded, with directions to the court below to modify its judgment in accordance with this opinion.

(WALLACE, C. J., being disqualified, did not sit in this cause.)

I dissent from the foregoing opinion and judgment on the grounds, among others, that the contract which is ordered to be specially enforced is not set up in the complaint; that if that contract ought to be enforced, the portion of the purchase money which was deposited in the name of an agent or attorney of the plaintiff ought to be ordered to be paid to the defendants, and that the defendants ought not to be held responsible for the rental value of the land.

RHODES, J.

[No. 5,578.]

[Filed April 4, 1878.]

WETZLAR, RESPONDENT, vs. FITCH, APPELLANT.

JURISDICTION OF PROBATE COURT.—The Probate Court has no jurisdiction to receive or in any way to act upon an account of a deceased executor with the estate of which he was executor when presented by the executor of the deceased executor.

Appeal from Fourteenth District, Placer County.

John E. Keenan was appointed executor of the estate of Rosanna Keenan, deceased, in September, 1865. In May, 1869, he died without rendering any account of his administration.

Keenan made a will appointing three persons—of whom the plaintiff Wetzelar is the sole survivor—his executors. This will was admitted to probate in June, 1869, and letters issued to said executor, Rosanna Keenan. No administrator of the estate was appointed until July, 1876, when one Bronner, the public administrator, took charge of her estate. On the 29th of December, 1876, Julius Wetzelar, as executor of the estate of John C. Keenan, deceased, presented to the

Probate Court the account of the deceased executor, John C. Keenan, with the estate of Rosanna Keenan, deceased, claiming that the estate of Rosanna Keenan, deceased, was indebted to the estate of said John C. Keenan in the sum of \$9,481 93, growing out of the transactions of John C. Keenan, as executor, and asked the court to set a time for the hearing of said account. The court denied this application, and plaintiff Wetzlar applied to the Judge of the Fourteenth District Court for a writ of mandate to compel the appellant to set a day for the hearing of said account.

The District Court made an order that a peremptory writ issue as prayed for, from which judgment this appeal is taken.

John M. Fulweiler and Hale & Craig, for appellant.

The Probate Court, not being an inferior tribunal, the District Judge had no jurisdiction in the premises. (C. C. P., Sections 98, 1035; *Pond vs. Pond*, 10 Cal. 495.)

There is no law requiring the Probate Judge to set for hearing the account of a deceased executor. This point was settled in the case of *Bush vs. Lindsay* (44 Cal. 121).

Geo. Cadwalader, for respondent.

The Probate Courts of this State are courts of inferior jurisdiction. They have probate jurisdiction only, and only such probate jurisdiction as the Legislature entrusts to them. (*Bush vs. Lindsay*, 44 Cal. 125.)

The Probate Court has jurisdiction to order the payments of debts due from estates. (Sec. 97, sub. 9, C. C. P.)

To appoint a day for the settlement of accounts presented. (Sec. 1633.)

The claim is against the estate and not against the deceased. They have no standing until allowed by the Probate Court after notice to all parties interested. (6 Cal. 435; 24 Cal. 93; 38 Cal. 88.)

PER CURIAM.

The Probate Court had no jurisdiction to receive or in any way to act upon the account presented by the petitioner as executor of the estate of John C. Keenan, deceased. (*Bush vs. Lindsay*, 44 Cal. 121.)

It is not necessary to decide whether the Probate Court is an "inferior tribunal" to which *mandate* may issue out of the District Court.

Judgment reversed, and cause remanded with directions to dismiss the action and proceeding.

Recent Decisions.

WEST PHILADELPHIA PASSENGER R. W. CO. vs. WHIPPLE.

(Supreme Court of Pennsylvania. January 28, 1878.)

CONTRIBUTORY NEGLIGENCE—APPLIANCES TO PREVENT FALLING IN STREET CARS
—WOMAN'S DRESS—JURY.—Whether a woman is guilty of negligence in not making use of the ordinary appliances furnished by a common carrier to prevent standing passengers from falling is a question for the jury, under the facts of the case; and the fact that the woman was so dressed as to render it inconvenient to take hold of a car strap will not *per se* render her guilty of negligence.

Error to Common Pleas No. 4 of Philadelphia County.

Miss Whipple (the plaintiff), in company with a Mrs. C. and a child, got upon a car of the defendant. The car was full, and some passengers were standing. Mrs. C., however, obtained a seat, and took the child on her lap. Miss Whipple, in order to support herself, took hold of both Mrs. C.'s hands, and stood sidewise in the car and facing Mrs. C. At the end of the defendant's route were two wheelrests or bumpers to prevent the car from running down hill while the horses were being changed. The car, coming into collision with the bumpers, stopped short, and the plaintiff was thrown down and her knee-cap fractured. The car was provided with hand-straps from the roof. Each strap was five feet four inches from the floor. The plaintiff was not an undersized woman. She explained her not taking hold of the strap as follows: "The strap in the car was too short for me to reach. I could touch it but I could not hold it. A lady's stays prevent her holding the strap." Elcock, J., charged

the jury: "If the straps are reasonable appliances, and she could use them with ordinary convenience, she was bound to take hold of them; but if she could not reach them without extraordinary exertions, she was not. She says she could not without damage to or disarrangement of her dress; that owing to the customary mode of dress, and woman's physical formation, she could not, except at the risk alluded to, reach these straps. If she could not, then did she do the next best thing in the situation, viz.: hold on to the hands of her friend, who was seated, and was that prudent, or did it increase the risk of her falling?" The jury found a verdict for the plaintiff for \$5,500, on which the court entered judgment. The part of the charge above quoted, and the refusal to instruct the jury to find for the defendant, were, *inter alia*, assigned as error.

C. S. Patterson, for plaintiff in error. Negligence is not to be presumed, but proven affirmatively. Here there was no sufficient evidence of negligence on the part of the company, and the judge should so have instructed the jury. (*P. & R. R. Co. vs. Hummel*, 8 Wr. 377.) The plaintiff was guilty of contributory negligence. Her reason for not taking hold of the strap was insufficient. (*Beatty vs. Gilmore*, 4 Har. 463; *Navigation Co. vs. Norton*, 12 Ib. 465; *Heil vs. Glanding*, 6 Wr. 493; *Catawissa R. Co. vs. Armstrong*, 13 Ib. 186; *Sullivan vs. R. R. Co.*, 6 Cas. 234; *P. R. R. Co. vs. Zebe*, 9 Ib. 318; *R. R. Co. vs. Evans*, 3 P. F. Sm. 254; *Waters vs. Wing*, 9 Ib. 211; *Canal Co. vs. Bentley*, 16 Ib. 33; *Hays vs. Gallagher*, 22 Ib. 141.) The court should have declared plaintiff's conduct negligent. (*P. R. Co. vs. Glassey*, 7 P. F. Sm. 174; *P. R. R. Co. vs. Barnett*, 9 Ib. 259; *Kay vs. R. R. Co.*, 15 Ib. 269; *R. R. Co. vs. McElwee*, 17 Ib. 311; *Johnson vs. R. R. Co.*, 20 Ib. 357; *McKee vs. Bidwell*, 24 Ib. 218; *R. W. Co. vs. Hassard*, 25 Ib. 376; *R. R. Co. vs. Stinger*, 28 Ib. 225; *R. R. Co. vs. Armstrong*, 2 Ib. 286; *R. R. Co. vs. McClurg*, 6 Ib. 297; *Johnson vs. Bruner*, 17 Ib. 315.)

D. Dougherty (with whom was E. H. Hanson), *contra*. The duty of the passenger was modified by the circumstances,

and alleged negligence arising from a failure to perform such duty must be submitted as a fact to the jury. See the later cases cited by the other side.

PER CURIAM.

The charge of the learned judge, and his answers to the points, appear to be reasonably sound and quite fair to both sides. He left both the cause of the injury and the question of contributory negligence fairly to the jury, to whom both questions properly belonged under the evidence. To have charged the jury against the plaintiff, as a matter of law, upon the entire evidence, would have been a palpable invasion of their province. Even as to catching hold of the straps overhead, he could not have told the jury more than he did. He said: if the straps are reasonable appliances, and she could use them with ordinary convenience, she was bound to take hold of them. This was going quite as far as a court ought to go upon a matter of fact of this nature. Was she to take hold, though beyond her reach and extraordinarily inconvenient? Who was to judge of her power to seize and to hold on to them, and if she could not, of what she should do next? Are we to say, as a matter of law, that women are to dress in a certain way, and that their ordinary habits, according to the usage of society, are to be cast aside when they enter a car, for fear they should find no seat? Clearly these are facts which enter into the question of negligence, and form a part of that whole out of which the jury alone must draw the conclusion.

Possibly a woman may be so fantastically and foolishly hooped, wired, and pinned up, as to deprive her of her natural power to help herself; but if so, the question is one of fact and not of law, and so we incline to leave it, instead of imposing upon our brethren below the difficult duty of prying into the artificial stays of the plaintiff's case.

Judgment affirmed.

Notes of Recent Decisions.

Constitutional Law: Law impairing: obligation of contract: Homestead Law.—A homestead is not exempt from the payment of a debt contracted *before* the passage of the Homestead Law, although the debt has been barred by the Statute of Limitation, and a new promise is made subsequently thereto. The statute does not extinguish the debt, but only bars the remedy. Sup. Ct., Tennessee, Dec. 1877. *Woodlie vs. Towles* (Memphis L. J.)

Chattel Mortgage: When not valid.—A chattel mortgage to secure an antecedent debt on the present and after-acquired property of the mortgagor, and which authorizes him to sell the mortgaged chattels in the regular course of his business, and apply the proceeds to his own use, is void. U. S. Dist. Ct., New Jersey, March 5, 1878. *Matter of Bloom* (Alb. L. J.)

Chattel Mortgage: When valid and when void.—Does the permission of the mortgagee to the mortgagor to retain possession of the mortgaged goods invalidate the mortgage? *Held:* that if the mortgaged property had consisted of household furniture, or of any property of a like character, where the right or privilege of using the same would not necessarily imply the right or privilege of selling and disposing of the same, then the permission to retain possession would not, of itself, vitiate the mortgage; but when, as in this case, the mortgage is given on a stock of men's and boys' clothing, etc., or a stock of goods or merchandise of any kind, and it is apparent that the only usual mode of using the same is to sell and dispose of such stock, and the mortgage contains no stipulation that the proceeds of such sale shall be applied to the payment of the mortgage debt, or the debt of any other creditor, such mortgage is, and ought to be, declared to be void on its face. Sup. Ct., Indiana, April 4, 1878. *Mobley vs. Letts* (Chi. L. News.)

Statute of Limitation: when statute of loci contractus not pleadable in foreign jurisdiction.—A Statute of Limitations of

the *loci contractus* can not be pleaded in bar in a foreign jurisdiction, where both parties were resident in the *loci contractus* during the whole statutory time, so as to make the bar complete there, unless such statute go to the extinction of the right itself, and not to the remedy only. The rule at common law is: that the time of the limitation of actions depends on the law of the forum, and not on the law of the State or country where the contract was made. A statutory bar of one State can not be pleaded in another, where the bar affects the remedy only. Sup. Ct. Mississippi, Feb. 4, 1878. *Perkins vs. Gay* (Memph. L. J.)

Book Notices.

BUMP'S NOTES OF CONSTITUTIONAL DECISIONS.

NOTES OF CONSTITUTIONAL DECISIONS: Being a digest of the judicial interpretation of the Constitution of the United States as contained in the various Federal and State reports, arranged under each clause of the Constitution; together with an appendix containing the Declaration of Independence and Articles of Confederation. By ORLANDO F. BUMP. New York: Baker, Voorhis & Co. 1878.

The people of this State are soon to be called upon to frame a permanent, fundamental, and supreme law. The importance of the subject can not be over-estimated. The discussion and exposition of the various clauses which ought or ought not to be embodied in the new Constitution, demand the nicest discrimination and most intelligent investigation on the part of those who may be called upon to direct public opinion. Many provisions in the State and Federal Constitutions are identical. The general rules of construction and interpretation are the same as to both. Among the best books for reference and consultation in this direction we do not hesitate to class the work just compiled and issued by Orlando F. Bump.

Mr. Bump has already attained high rank in the field of legal authorship by the successful presentation to the pro-

fession of a standard work on fraudulent conveyances, and of a bankruptcy compendium, which has passed through nine editions, and found its way into universal use. These facts—*prima facie*—entitle the volume now before us to a favorable reception by the bench and bar.

The work consists of the Constitution of the United States, with notes under each clause and section referring to the cases in which it has been construed or applied, whether the cases arose in the Federal or State courts. Where the cases upon a particular subject have been numerous, the notes have been arranged under appropriate subdivisions. The reader is thus enabled, with great facility, to tell whether there is any decision upon the particular point which he is considering. The litigation of more than eighty years is claimed to be embodied in this volume; and the law, as settled by such litigation, may be regarded as nearly unchangeable.

WHARTON'S LEGAL MAXIMS.

LEGAL MAXIMS, WITH OBSERVATIONS AND CASES. Part I. One hundred maxims, with observations and references to American cases. Part II. Eight hundred maxims, with translations. By **GEORGE FREDERICK WHARTON**, of the English bar. To which is added, in this edition, Part III. Several hundred maxims with references to English cases. New York: Baker, Voorhis & Co. 1878.

This is a work embracing over twelve hundred legal maxims, with references to English and American cases. The principal and familiar maxims are arranged in Part I, the plan being to state each maxim, with the source from which it was taken, together with a translation into English, and then to present a short essay upon it, referring to the most important cases for the practical application thereof. Part II contains eight hundred maxims, with translations. Part III contains several hundred maxims taken from Abbott's *New York Digest*, and which have been commented on or applied by the court of last resort, or other courts of general jurisdiction of the State of New York, in the cases cited.

There is also, at the end of the volume, under the head of "MAXIMS OF JURISPRUDENCE," a valuable collection, with com-

ments and illustrations, taken from the Civil Code prepared for the State of New York by the Commissioners of the Code in 1857-1865. The Legislature of that State failed to act upon the proposed Code. Subsequently, the State of California, on adopting with some modifications, as the law of this State, the labors of the New York Commissioners, included in our Code the maxims now given at the end of this work.

FIELD ON CORPORATIONS.

FIELD ON THE LAW OF PRIVATE CORPORATIONS.—A treatise on the law of private corporations, by **GEORGE W. FIELD**, author of *A Treatise on the Law of Damages*, etc., etc. Albany: John D. Parsons, Jr., publisher, pp. 789.

This is a treatise on the law of private corporations, by George W. Field, of Albany, author of *A Treatise on the Law of Damages*, etc., etc. The multiplication of corporations at the present day, particularly in California, renders it absolutely necessary for every practitioner to familiarize himself with the somewhat abstruse doctrines which appertain to their character and existence. The law of corporations has been so liberalized and enlarged in recent times as to constitute a branch of jurisprudence, with a code of its own. Corporations (*collegia*) were known to the Roman law, and existed from the earliest periods of the Roman republic—presumably borrowed from the Greeks. But the policy of the Roman government restricted, with extreme jealousy, the number and the objects of these combinations of individuals, on the ground that they were likely to prove nurseries of faction and disorder. Chancellor Kent quotes an example from the younger Pliny tending to illustrate the narrow views of the Emperors on this subject. It was proposed, just after a destructive fire in Nicomedia, to organize a fire company of one hundred and fifty men, who should follow that business exclusively without any other powers or privileges. The Emperor Trajan refused to grant a charter, observing that all such societies were mischievous. Corporations under such unpropitious influences could not have at-

tained much growth. In England, where the idea of corporations was borrowed from the Roman law, they were at first rarely created for any purpose other than for municipal towns, and then generally by royal charter.

It may therefore be said that it is only within the last half century that the essential nature and character of corporations, and their relation to the business transactions of the community, have undergone an expansion and development, the importance of which can hardly be over-estimated.

The treatise now before us is all that can be desired in classification of topics and clearness of statement. It discusses in detail many subjects not heretofore sufficiently presented in other works upon corporations. Such heads as STOCKHOLDERS, ILLEGAL ISSUES OR TRANSFERS, INVALID SUBSCRIPTIONS, POWERS OF DIRECTORS, AMALGAMATION AND CONSOLIDATION, and so forth, will be found convenient to those actively engaged in professional labors in their investigations of the law relating to the various questions therein discussed.

CHOICE BOOKS FOR THE LIBRARY.

A general catalogue of choice books for the library, comprising a selection of books by ancient and modern authors in all departments of literature, science, and art, classified and priced. Twelve mo., 242 pages. Price, sent by mail, prepaid, 25 cents. Robert Clarke & Co., publishers, 65 West Fourth Street, Cincinnati, O. May, 1878.

This book will be of great service to purchasers, librarians, and others in selecting and buying their books. It contains standard works in the leading departments of literature, giving the editions, prices, etc. These have been classified alphabetically under 142 subjects or heads of departments. Over 8,500 titles of works are given, which appear under the proper heads, arranged alphabetically—by authors. Books on special subjects are still further indexed to the number of nearly 600 titles. It will prove a fine auxiliary to the searcher for authors, as well as a useful guide to editions and prices.

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Current Topics.

THE following rule has been added to the rules adopted by the Supreme Court, and takes effect July 8, 1878 :

Rule 38. When the judge before whom an action was tried is dead, any unsettled bill of exceptions or statement, on motion for new trial therein, may be settled and certified by his successor in office, or if he be disqualified by the judge of an adjoining district, when the action was tried in a district court; and by the judge of any adjoining county, when the action was tried in a county court.

IN *State of California vs. Townsend* (Copps' Land Owner), the Secretary of the Interior holds that lands are not surveyed until the survey is approved and becomes of record in the district land office. The lands in this case had been surveyed in the field by the United States Surveyor-General, and the subdivisions distinctly marked off, and the adoption by the State of the government survey in making these selections was equivalent to an original survey by her within the third section of the Act of July 23, 1866. (See *Oakley vs. Stuart*, 1 P. C. LAW JOURNAL, 228.)

THE Supreme Court of the United States, in *Atherton vs. Fowler*, recently delivered, held that no right of pre-emption can be established by a settlement and improvement on public lands where the claimant has obtained possession by breaking into the inclosure of one who has already settled upon, improved, and inclosed the land.

Such an intrusion, though made under pretense of pre-

empting the land, is but a naked unlawful trespass and can not initiate a right of pre-emption.

IN *First National Bank of Barnesville vs. Western Union Telegraph Co.*, decided by the Supreme Court Commission of Ohio, it was held that for failure to deliver a telegraphic message the company is liable only for damages which flow directly and naturally from the breach of the contract.

Before the company can be charged with special or peculiar damages it must have had notice that they were likely to arise from a breach of the contract.

Upon breach of the contract nominal damages may be recovered if actual damages are not proved. (*Leonard vs. Telegraph Co.*, 41 N. Y. 544; *Bingham vs. Telegraph Co.*, 18 Up. Can., Q. B. 60; *Stevens vs. Telegraph Co.*, 16 Up. Can., Q. B. 530; *Squire vs. Telegraph Co.*, 98 Mass. 232; *Parker vs. Telegraph Co.*, 13 Cal. 422; *Bryant vs. Telegraph Co.*, 1 Daly, 575; *Telegraph Co. vs. Wenger*, 55 Penn. St. 262; *Baldwin vs. Telegraph Co.*, 54 Barb. 505; 45 N. Y. 744; *Landsberger vs. Telegraph Co.*, 32 Barb. 536.)

IN *Dean vs. McDowell* in the English Court of Appeals (6 Cent. L. J. 468), that the right of one partner to share in the profits made by another partner in another business carried on in contravention of the partnership articles is confined to three cases, viz: When the profits have arisen (1) by use of the partnership property; (2) from a business in rivalry with the partnership; or (3) in a transaction carried on by taking an unfair advantage of his connection with the partnership. In other cases there is no such remedy unless it is expressly given by the articles.

That without this the partners are in the simple position of covenantor and covenantee, and the only remedy is by injunction or dissolution, or, after the termination of the partnership, by action of damages.

The plaintiff and defendant entered in 1866 into articles of partnership as Dean Brothers, in which the defendant was made the managing partner, and covenanted (clause 8) to devote his whole time to the business, and also (clause 11) that

"he would not alone nor with any other person either directly or indirectly engage in any trade or business except on account and for the benefit of the partnership." The business of the firm was that of salt merchants and salt brokers, selling salt upon commission for manufacturers, among whom their chief constituents were a firm of Nicholas, Aston & Co.

The partnership between the plaintiff and defendant expired by effluxion of time on the 28th of February, 1873. Subsequently the plaintiff discovered that in 1871 the defendant had entered into a secret partnership with one Wilson to purchase the business of salt manufacturers belonging to Nicholas, Aston & Co., and to carry it on simultaneously with his partnership with the plaintiff.

The transaction was arranged in the following manner: The defendant provided the capital for the purchase and carrying on of the business of Nicholas, Aston & Co., but put in a son as nominal partner of Wilson. The son executed a declaration that he was only nominee of his father. Articles of partnership were entered into between Wilson and the defendant's son for a term which would expire one month after the termination of the defendant's partnership with the plaintiff, *i. e.*, on the 31st of March, 1873, and the business was carried on under the old name of Nicholas, Aston & Co. Accordingly the defendant, after the termination of his partnership with the plaintiff, took his son's place in the partnership with Wilson, and they then continued the business of salt manufacturers, selling their own salt and not employing brokers.

The plaintiff on discovering these facts filed a bill in 1874 claiming an account of the profits made by the defendant in the business of Nicholas, Aston & Co., during his partnership with the plaintiff.

After this, Wilson retired from the firm of Nicholas, Aston & Co., and left the defendant the sole owner of that business.

The plaintiff brought a further action in which he claimed to have the business of Nicholas, Aston & Co. accounted for to the partnership of Dean Brothers, as an accretion from the advantage taken by the defendant of his fiduciary position in the latter partnership.

WE call attention to the new timber act published in this number. The regulations referred to in the act, to be prescribed by the Commissioner of the Land Department, have not yet been promulgated. We will insert a copy as soon as obtained, thus giving our subscribers the full benefit of this important measure.

Supreme Court of California.

APRIL TERM, 1878.

(Unwritten opinion.)

[No. 5,900.]

[Filed April 20, 1878.]

WOOSTER, RESPONDENT, vs. PAIGE, APPELLANT.

1. In an action for a surgeon's fee, where the value of the services is denied and a counter-claim for damages for malpractice is set up, it is proper for the court to instruct the jury, as a matter of law, that the plaintiff was a competent surgeon.
2. In an action for a surgeon's fee, where the value of the services is denied and a counter-claim for malpractice is set up, the presumption is that plaintiff's treatment of the case was skillful, and "that he was competent for the task which he had undertaken, and did his duty to the best of his ability."
3. A party can testify as an expert in his own behalf.
4. Upon the question of skill in the surgeon, it is competent for him to prove a specific instance of successful treatment of a different patient for the same disease.
5. In estimating the value of a surgeon's fee, it is not competent for the defendant to prove what other competent surgeons charged for treating the patient during similar periods for the same disease.

The action was to recover \$1,000 for surgical services rendered in treating the defendant's child for hip disease. The answer denied that the plaintiff was a competent surgeon, and denied that the services were of any value, and contained a counter-claim for damages for malpractice. The evidence as to what treatment plaintiff gave, and as to whether it was the proper treatment, was conflicting. The court instructed the jury against defendant's exception: that "the plaintiff is a duly qualified, licensed, and practicing physician and surgeon." The appellant contended that this instruction

was erroneous, and that the question of skill or no skill should have been left to the jury.

The court next instructed the jury against defendant's exception—that the presumption was that the plaintiff "was competent for the task which he had undertaken, and did his duty to the best of his ability." The appellant contended that although such was the rule in actions by the patient against the surgeon for malpractice, yet that when the surgeon sued for the value of his services, and it was denied that the services were of any value, the fact of the surgeon's having skill was put in issue by that denial; that to give reasonable skill was his contract; that it was a part of his case to show that he performed his contract and gave the skill, and that the presumption as to skill was not in favor of plaintiff; and that it made no difference that the answer, in addition to its denials, contained a counter-claim for malpractice.

During the trial plaintiff testified as an expert, on his own behalf, against defendant's objection and exception. It was contended by appellant that such testimony was not competent; that it was necessary to the value of the testimony of an expert that he should be disinterested; and that although interest did not disqualify a party from testifying as to such facts as were within his knowledge, yet that it prevented his opinion from being of any value.

The plaintiff, during the trial, gave in evidence, against defendant's objection and exception, a specific instance of the skillful amputation, by himself, of the head of the femur of a patient whom he was treating for hip disease. It was contended that this was error.

Upon the question of value, the defendant offered to prove what other competent surgeons had charged for treating, during similar periods, the same child for the same disease. To the offer objection was made, and the testimony excluded. It was contended that this was error.

The court affirmed the judgment.

Robert Y. Hayne, for appellant.

C. Campbell, N. Hamilton, and A. J. LeBreton, for respondent.

United States District Court.

DISTRICT OF CALIFORNIA.

[No. 2,210.]

[Filed May 13, 1878.]

VAN SICE vs. THE STEAMSHIP "COLIMA."

SALVAGE COMPENSATION—WHEN EMPLOYEES ENTITLED TO.—Where there is no evidence to show the nature of the contracts made by the company with the masters in their employ, or the existence of any usage or understanding with regard to compensation for assistance rendered to disabled vessels of the company, the masters are entitled to salvage compensation for services rendered disabled vessels belonging to the same owners and in the same general business.

IDEM.—The fact that of six instances where similar services have been rendered, and that the one at bar is the first where there has been an attempt to enforce a claim for salvage compensation by the master or crew, and the further fact that more than eighteen months elapsed before this suit was brought, and not until the libellant had ceased to be in the company's employ, is insufficient to establish an usage understanding or contract by which the rights of the libellant are modified.

HOFFMAN, J.

At the hearing of this cause it was stipulated that the facts as stated in the opinion of this court in the case of the *Pacific Mail Steamship Co. vs. 10 bales of Gunny Bags* (3 Sawyer R., p. 187) should be deemed and taken to have been duly proved in this cause.

The case referred to was a libel against the cargo of the steamer *Colima* for a salvage service performed by the steamer *Arizona*. The facts were briefly as follows:

On the 15th of March, 1874, the steamer *Colima*, then on a voyage from Panama to this port, having become disabled by the loss of several blades of her propeller, sought refuge under Cerros Island, where she came to an anchor on the succeeding day. Boats were dispatched to the north and south with instructions to intercept and send to her assistance any steamer that might be fallen in with.

After a navigation of several days one of the boats met the steamer *Arizona*, bound for San Francisco; and her master, on learning the situation of the *Colima*, at once proceeded to

Cerros Island, where he arrived on the morning of the 25th, and on the evening of the same day started with the *Colima* in tow for this port, where she arrived on the 30th of March. The distance from Cerros Island to San Francisco is 730 miles. The voyage of the *Arizona* was lengthened by reason of the service some two and a half or three days.

Her deviation was not considerable, as the usual course of steamers along the coast is, in fine weather, not far from the island, and such was in fact the position of the *Colima* when the accident occurred.

Both vessels belonged to the same owner—the Pacific Mail Steamship Co.

The present libel is filed by the master of the *Arizona* on behalf of himself and the crew to recover a salvage compensation.

In the reported case above referred to, it was held that the fact that both vessels belonged to the same owners was no bar to a claim for salvage against the goods on board the salved vessel. The authority chiefly relied on in the opinion delivered in that case was the *Miranda* (3 Saw. R. 187; 3 Adm. and Eccl., 561), in which the right of the master and crew of the salving vessel to a share of the compensation was recognized. In the case of the *Sappho* (Id. p. 142) the cause was instituted on behalf of the boatswain and seventeen seamen—part of the crew of the *Hero*. Both vessels belonged to the same owners.

The claim was resisted on the ground that it was commonly understood that where assistance is rendered to one vessel of a fleet belonging to a great company by another, salvage was never claimed by the crew. That the latter had not acted beyond the scope of their duties. They were bound by the articles to do what they did do, and were paid by wages for their time and labor.

But the court overruled the defense chiefly on the authority of Lord Stowell's judgment in the *Waterloo* (2 Dods, 433).

Sir Robert Phillimore, after citing Lord Stowell's language in that case, remarks: "It seems to me clear, from this language, that Lord Stowell intended to lay down the law that

the general right to salvage reward could be ousted only by virtue of an express agreement framed on the clearest and most binding terms."

The passage cited by the learned judge perhaps justifies the very strong statement of Lord Stowell's opinion, contained in the above extract. But on perusing the whole judgment, it will appear that Lord Stowell seems to admit that an exemption from liability to salvage may be made out by adequate proofs of an usage and understanding to that effect.

The grounds of exemption set up were: first, written documents, viz.: the charter party and instructions; and secondly, the usage which was described in the argument as generally understood by all parties.

It was in reference to the written documents that Lord Stowell uses the language quoted by Sir Robert Phillimore. Where the claim set up is a discharge from liability to salvage under any circumstances whatever, and this claim is founded on written documents, the discharge should "appear in express terms; and in a contract that, by the use of clear and explicit terms, should remove all doubt respecting the common understanding of both parties." But with respect to the second ground of exemption, Lord Stowell observes:

"It has been said, however, that there is an acknowledged understanding to this effect, and that this understanding is sufficiently proved by the usage as well as the instructions. As to the instructions, they appear to be very limited in their application. In the first place, they apply to associated ships only, and do not extend to other ships which are merely employed by the company, but if they did, they extend no further than to enjoin the duty of assisting other ships belonging to the company; but they do not express that this duty, which it is very proper to enjoin, shall receive no remuneration whatever for the active merit, whatever be the suffering incurred in performing it. It is the duty of all ships to give succor to others in distress—none but a free-booter would withhold it—but that does not discharge from liability to payment where assistance is substantially given.

The company might possibly sustain their claim for exemption in cases of slight services rendered by ships in their employ, but it is quite another thing to sustain a sweeping claim of exemption in all cases whatever. But the usage is said to prove the existence of the understanding. I have already noticed that the usage is not described in any proper limitation of its extent."

His Lordship then proceeds to consider the nature of the alleged usage, and the proofs in support of it.

He finds the former to be indefinite, and not described in any proper limitation of its extent, while the latter are insufficient and inconclusive.

It may, however, be inferred that if the reverse had been the case, and the usage and common understanding satisfactorily established, the exemption would have been allowed.

It is to be borne in mind that the case before Lord Stowell was a salvage service rendered by a ship *chartered* by the East India to a ship *owned* by the company.

It does not appear that the master and crew of the chartered ship were in the employ or in any respect the servants of the East India Co.

In the case at bar the claim is made by the master of a ship owned by the P. M. S. S. Co. for services rendered by him to another vessel owned by the same company, and engaged in the same general business.

No evidence whatever has been offered to show the nature of the contracts made by the company with the masters in their employ, or the existence of any usage or understanding with regard to compensation for assistance rendered to disabled vessels of the company. The court is not informed whether their appointments are general, and their services to be rendered on board of any ship to which they may be ordered, or whether they are special to serve as master of a specified ship. The instructions under which they act have not been exhibited.

They might perhaps have thrown some light on the question, whether taking a disabled vessel of the line in tow for a few hours or days is not within the scope of the duties re-

quired by their contract, and in the contemplation of both parties to be rendered without extra compensation.

The only fact in evidence from which a tacit understanding of this nature may be suspected is that of six instances where similar services have been rendered, the present is the first where the claim to salvage compensation has been attempted to be enforced by the master and crew. And even in this case the libel was not filed until more than eighteen months after the service was rendered, and not until the libellant had ceased to be in the company's employment. But these facts are insufficient to establish an usage understanding or contract by which the rights of the libellant are modified or controlled. And as the authorities are clear that the fact that both vessels belonged to the same owner furnishes to the latter no ground of exemption, I am obliged to recognize the claim of the libellant to a salvage remuneration.

But it is a claim that can not be viewed with favor.

No proofs are necessary to show that the vessels of the company's line plying between this port and Panama are liable to become disabled and almost helpless from accidents to their machinery. That the aid of other vessels of the line is not unfrequently required and afforded is in evidence. It may reasonably be presumed that to render such assistance is a duty contemplated by the masters of the steamers as likely to arise, and the fact that, so far as appears, no claim has hitherto been made for a salvage remuneration for discharging it, and the circumstance that this claim was not made until long after the performance of the service, justify the suspicion that it was an after-thought, and was not contemplated when the service was rendered—a suspicion confirmed by the fact that in the suit by the P. M. S. S. Co. to recover a salvage compensation from the owners of the *Colima*'s cargo, no claim was made on behalf of the libellant or crew to be allowed a share of the salvage. The service itself was of a low order of merit. It consisted merely in towing the *Colima* into port, and involved, so far as appears, no exertion or labor on the part of the master or crew of the *Arizona*. The paltry inconvenience to which they were subject-

ed was that their voyage was lengthened some two and a half or three days.

In the case of the *Sappho*, \$1,750 were awarded, to be divided among eighteen of the crew. The service lasted five days during tempestuous weather, and was difficult and perilous.

I shall award to the libellant the sum of \$250, being the amount of one month's pay.

The crew in whose behalf he professes to sue are not represented in court. His proctor disclaims all authority from them to commence the suit. He is ignorant of their whereabouts, and does not even know their names. It is not pretended that they have empowered or requested the master to act for them.

They have probably long since dispersed to various quarters of the globe, and any sum decreed to them would remain unclaimed in the registry of the court.

There can be no propriety in decreeing to them a compensation which they have not asked, and to which they probably do not consider themselves entitled.

TIMBER ACT.

AN ACT FOR THE SALE OF TIMBER LANDS IN THE STATES OF CALIFORNIA, OREGON, NEVADA, AND WASHINGTON TERRITORY.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and

sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled, "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoev-

er, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object in

writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

SEC. 4. That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars: *Provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

SEC. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States, who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: *Provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the

right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved June 3, 1878.

Department of State, Washington, June 7, 1878.

A true copy.

SEVELLON A. BROWN, Chief Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1877.

UNITED STATES vs. VAN AUKEN.

The Act of Congress of July 17, 1872, section 2 (12 Stat. 592; Rev. Stat. 711, § 3583), declares that "no private corporation, banking association, firm, or individual, shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation, *for a less sum than one dollar*, intended to circulate as money, or to be received or used in lieu of lawful money of the United States," and provides a penalty for a violation of the act. Defendant was indicted for circulating an instrument reading as follows: "The Bangor Furnace Company will pay the bearer on demand fifty cents, in goods, at their store in Bangor, Mich." *Held*: that the instrument not being payable in lawful money, the issue and circulation thereof was not in violation of the act in question.

On a certificate of division in opinion between the judges of the Circuit Court of the United States for the Western District of Michigan.

Mr. Justice SWAYNE delivered the opinion of the court.

The Act of Congress of July 17, 1872, § 2 (12 Stat. 592; Rev. Stat. 711, § 3583), declares that "no private corporation, banking association, firm, or individual, shall make, issue, circulate, or pay out any note, check, memorandum,

token, or other obligation, *for a less sum than one dollar*, intended to circulate as money, or to be received or used in lieu of the lawful money of the United States," and announces as a penalty for the offense fine or imprisonment, or both.

Van Auken was indicted under this act for circulating the "obligations" of the Bangor Furnace Company, a corporation created by and under the laws of the State of Michigan, which obligations are alleged to be in *hæc verba*.

BANGOR, MICH., August 15, 1874.

"The Bangor Furnace Company will pay the bearer on demand fifty cents, in goods, at their store in Bangor, Mich.

(Signed)

"A. B. HOUGH, Pres.

"CHAS. D. RHODER, Treas."

"Each of said obligations was for a less sum than one dollar, and was intended by the said Aaron Van Auken to circulate as money, and to be received in lieu of the lawful money of the United States, contrary," etc.

Van Auken demurred to the indictment. The opinions of the judges of the Circuit Court were divided and opposed upon two questions, which were thereupon certified to this court for final determination.

1. Whether the obligation set forth in the indictment is within any valid statute of the United States.

2. Whether the statute under which the indictment was found is constitutional.

The solution of the first question depends upon the construction to be given to the words "*for a less sum than one dollar*." The object of the provision was obviously to secure as far as possible the field for the circulation of stamps, as provided in the preceding section, without competition from any quarter. (This currency was superseded by the fractional notes authorized to be issued by the Act of March 3, 1863, § 4, 12 Stat. 711.) Small notes payable in any specific articles, if issued, could have only a neighborhood circulation, and but a limited one there. It could be but little in the way of the stamps or small notes issued for the purpose of circulating change by the United States. Congress could,

therefore, have had little or no motive to interfere with respect to the former. This must be borne in mind in the examination of the question in hand.

A dollar is the unit of our currency. It always means money or what is regarded as money. In this case the statute makes it the standard of measure with reference to the forbidden notes and obligations. If one of them be for a larger "sum than one dollar," it is not within the prohibition and is not affected by the law. It is a fair, if not a necessary inference, that the standard of measurement named was intended to be applied only to things *ejusdem generis*, in other words, to notes for money and to nothing else.

It is certainly inapplicable to anything not measurable by the pecuniary standard. It could not be applied where the measurement was to be, *ex gratia*, by the pound, the gallon, the yard, or any other standard than money. This view is supported by the statutory requirement that the forbidden thing must be "intended to circulate as money, or to be received or used *in lieu of the lawful money of the United States*."

One of the lexical definitions of the word "sum," and the sense in which it is most commonly used, is "money." "Sum. (2) A quantity of money or currency; any amount indefinitely, as a sum of money, a small sum, or a large sum." (Webster's Dic.) "For a less sum than one dollar" means exactly the same thing as, for a less sum of money than one dollar. In the former case there is an ellipsis. In the latter it is supplied. The implication where the omission occurs is as clear and effectual as the expression where the latter is added. The grammatical construction and the obvious meaning are the same. The statute makes the offense to consist of two ingredients: (1) The token or obligation must be for a less sum than a dollar. (2) It must be intended to circulate as money, or in lieu of the money of the United States. Here the note is for "goods," to be paid at the store of the Furnace Company. It is not payable in money, but *in goods*, and in goods only. No money could be demanded upon it. It is not solvable in that medium. (*Watson vs. McNairy*, 1 Bibb, 356.) The sum of "fifty cents" is named, but merely as the

limit of the value in goods demandable and to be paid upon the presentment of the note. Its mention was for no other purpose and has no other effect. In the view of the law the note is as if it called for so many pounds, yards, or quarts of a specific article. The limit of value, there being none other, gave the holder a range of choice as to the articles to be received in payment—limited only by the contents of the store.

But it is said the indictment avers that the note was intended to circulate as money, and that the demurrer admits the truth of the averment.

To this there are two answers:

1. The demurrer admits only what is well pleaded.
2. The offense, as we have shown, consists of two elements: the thing circulated, and the intent of the party circulating it.

The demurrer, at most, admits only the latter. As to the former, the judgment of the court is left unfettered, just as if the question before us had been raised by a motion to quash instead of a demurrer.

The first question certified must be answered in the negative. The second one it is, therefore, unnecessary to consider.

Notes of Recent Decisions.

Landlord and Tenant: when landlord must keep property safe for persons using it.—The Mill Company owned a strip of land in Minneapolis lying along near the river, and constructed through it a canal, into which it took water at the upper end, and furnished it for water power to the tenants to whom it rented mill sites on each side of the canal. It rented these mill sites with the right of way across the canal to each tenant. Over this canal for its entire length and breadth was constructed a platform of timbers and planks which was used for over ten years with the knowledge and

acquiescence of the company, by all persons having business with the mills along the sides of the canal, in the same way as a public thoroughfare is used. Morrison was the company's tenant of a mill site abutting on the canal, and a sub-tenant of his constructed a part of the platform opposite the premises sublet. This sublease expired, leaving Morrison in possession under the lease to him of the mill site let to him by the company. *Held*: that as to all persons going upon this platform to transact business with mills along the canal, it was the duty of the company, and not of Morrison, to use ordinary care and diligence to keep the platform. Sup. Ct. Minnesota, April 8, 1878. *Nash vs. Minneapolis Mill Co.* (N. W. L. Rep.)

Respondent Superior: when city not liable for negligence of contractor.—A city contractor for building a sewer is liable for the negligence of his employees, by which damage accrues to a citizen. The action does not lie against the city. Sup. Ct. Pennsylvania, January 7, 1878. *City of Erie vs. Caulkins.*

Action: On contract for personal services, when it accrues.--Plaintiff agreed to work for defendant for one year at stipulated wages, and he was to be paid at the *end* of the term of service. He left before his term of service expired, and brought suit for the *immediate* recovery of the wages he had already earned. *Held*: he could not bring suit to recover, until his term of service had expired, according to the stipulation of the contract. Sup. Ct. Iowa, March, 1878. *Powers vs. Wilson* (Alb. L. J.)

Corporation: Church corporation: Borrowing money to build meeting-house not ultra vires.—The charter of a corporation declared that its object is *inter alia*, the building of a meeting-house, etc., and providing for the payment of expenses from pew rents. The amount thus realized being inadequate, the trustees borrowed money on their individual notes. The society resisted the payment of this borrowed money because the charter made no provision therefor. *Held*: that the object of the corporation could not be carried out without a meeting-house. If it hired laborers, bought

materials, or borrowed money for the consummation of that purpose, it was liable. The evidence tending to show how the business was conducted and settled, ratified by a partial payment, was sufficient to submit to the jury, to find that the money was used in rebuilding the church. Sup. Ct. Pennsylvania, Jan. 9, 1878. *First Baptist Church of Erie vs. Neeley's Administrator* (Pittsb. L. J.)

Book Notices.

EPITOME OF FEARNE ON REMAINDERS.

An epitome of Fearne on contingent remainders and executory devices, intended principally for the use of students. By WILLIAM M. COLEMAN, Esq. Philadelphia: T. & J. W. Johnson & Co. 1878.

As the author says in his preface, an acquaintance with Fearne is indispensable to the student who desires to be thoroughly grounded in the common law relating to real property. This little work, of 100 pages, is an abstract of Fearne, and is intended to serve as an introduction to the original work. We have examined the work, and know no method better calculated to put the student in possession of the principles discussed in the original work than by producing each principle coupled with an illustration and explanation.

It will prove of value to the practicing lawyers in refreshing their memories in respect to the intricate doctrines of the law on that subject.

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Current Topics.

THE following is the full text of the bill repealing the Bankrupt Act as it passed both Houses and received the President's signature :

“Be it enacted, etc., that the bankrupt law approved March 2, 1867, title 61, Revised Statutes, and an act entitled, ‘An act to amend and supplement an act entitled an act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and for other purposes, approved June 22, 1874,’ and all acts in amendment or supplementary thereto, or in explanation thereof, be, and the same are, hereby repealed.

“Provided, however, that such a repeal shall in no manner invalidate or affect any case, in bankruptcy instituted and pending in any court prior to the day when this act shall take effect; but to all such pending cases, and all future proceedings therein, and in respect of all pains, penalties, and forfeitures which shall have been incurred under any of said acts prior to the day when this act takes effect, or which may be therefore incurred under any of those provisions of any of said acts which for the purposes named in this act are kept in force, and all penal actions and criminal proceedings for a violation of any of said acts, whether then pending or thereafter instituted, and in respect to all rights of debtors and creditors (except the right of commencing original proceedings in bankruptcy), and all rights of and suits by or against assignees under any or all of said acts in any matter or case which shall have arisen prior to the day when this

act takes effect (which shall be on the 1st day of September, 1878), or in any matter or case which shall arise after this act takes effect in respect of any matter of bankruptcy authorized by this act to be proceeded with after said last-named day, the acts hereby repealed shall continue in full force and effect until the same shall be fully disposed of, in the same manner as if said acts had not been repealed."

The act of our Legislature for the relief of insolvent debtors and protection of creditors approved May 4, 1852, and the amendatory acts approved March 12, 1858, April 27, 1860, April 27, 1863, and March 31, 1876, were all superseded by the bankrupt act, but now upon its repeal they are again in full force. They were in no manner affected by any of the provisions of the Code. It will be observed that the repeal takes effect Sept. 1, 1878.

WE are pleased to acknowledge the receipt of a printed copy of the address of Hon. S. C. Hastings, the founder of the "Hastings Law Department of the University of California," before the Regents, President, and Faculty.

"The desire of the founder," says the speaker, "is to diffuse a knowledge of the great principles of jurisprudence, not only among those who propose to devote themselves to the noble profession of the law, but also among all classes of society; to elevate the general standing of the bar, and to maintain and perpetuate the purity and dignity of the bench."

He then discusses the mode of instruction, and expresses the following as his views of what should be done :

"If it should so be that these views meet the approval of the directors named in the statute, I shall be pleased. If they do not, I shall submit cheerfully to their better judgment.

"By Section 1 of an Act entitled 'An Act to authorize S. C. Hastings to found a college of the Law in the University of California, approved March 26th, 1878,' I am authorized to found and establish a college, to be forever known as 'Hastings College of the Law,' which shall be the Law Department of the University of California.

"The officers of this college shall be a Dean and Registrar, to be appointed by a Board of Directors, consisting of J. P. Hoge, W. W. Cope, Samuel M. Wilson, Delos Lake, O. P. Evans, Thos. B. Bishop, John R. Sharpstein, and Thomas I. Bergin, of the Bar Association of the City of San Francisco, and who shall forever fill all vacancies with some member of said association, or otherwise.

"These directors are presided over by the Chief Justice of the Supreme Court of the State, who is made *ex-officio* President.

"The Dean shall be one of the Faculty of the University, and the President thereof shall issue all diplomas, etc. A suitable hall shall be provided by the State at the University for the use of the students, and a similar hall by the Board of Supervisors at San Francisco, and to be appropriated to lectures and examinations.

"Students may be matriculated, and become or remain residents of the University.

"This will include students in San Francisco and other parts of the State.

"The founder has proceeded not only to found but to establish the college in the following manner, viz.:

"He has applied for suitable halls at the University at Berkeley and at San Francisco, and has created the office of Proctor, who shall be a post-graduate of the University and himself a student.

"The duty of the Proctor shall be to constantly observe the conduct of the students in residence at the University, their habits of application, etc., and shall at all times respond to any questions which may be submitted to him, and when in doubt shall refer such questions to the Professor, at such times as the Professor shall be present.

"It shall be the duty of the Registrar to keep his office at San Francisco, receive and record all applications for matriculation, keep all the correspondence for the college, and specially to perform all the duties which may be imposed upon him by the Dean; and to keep a record of all the proceedings of the Directors, and to obey the Directors in all

things, and to enter in some book of records the names of post-graduates resident at the University, and the names of all students who shall receive examinations and lectures at the hall in San Francisco.

“The home or principal college, being itself the Law Department of the University, is established at Berkeley. The hall at San Francisco shall be auxiliary thereto as a part of said college, and the students who graduate from the San Francisco department shall have equal standing with the students at the University.

“It is the duty of the Dean to do all the business of the college, and to provide for lectures and examinations, and to discharge all the functions pertaining to his office, whether imposed by the Directors, or otherwise, and while he shall receive no salary out of the college funds for services, nothing herein shall prevent him receiving an honorarium from any source, the duties of this office being, from an elevated professional standpoint, deemed to be above a sordid pecuniary reward for services.

“There being at present no professorships founded, there shall be one professor known as the Professor of Municipal Law, whose duties shall be to lecture and examine the students at the University as often as he shall be directed by the Dean and Directors, and in the same manner at the lecture hall at San Francisco.

“This professor shall be appointed or removed by the Directors, and shall receive such salary as directed by them.

“This being the first post-graduate college of the University of California, great care shall be observed that no person shall enter as a student who shall be unworthy of a college of the eminent position it assumes, but the founder (and he hopes his descendants) will look upon the rejection of any applicant or student on account of his poverty or limited means of support as a calamity subversive of the object of the foundation.

“So far, there are no professorships established (except the one before mentioned), but with others, there will be provided the following, viz.: a chair of physiology and medi-

cal jurisprudence, and what is deemed of great importance, a chair of the science and ethics of the law and rules of morality. Until further endowments can be had, permanent professors can not be employed (except the professor of municipal law), and until then occasional lecturers will be supplied, and I am happy to state that in these departments of instruction there will be no want, for the present, of eminent men to do the work. And to this end I am permitted to announce the names of Dr. C. M. Hitchcock, the distinguished ex-army surgeon ; Drs. J. Campbell Shorb and Benjamin R. Swan.

“These gentlemen are well-known lecturers on science and medicine.

“In the department of ethics and rules of morality I find an unexpected reluctance on the part of eminent divines to enter the work, but it is with great pleasure that I have the hearty consent of that eminent divine, the Rev. W. H. Platt, Rector of Grace Church, to supply precisely the kind of lectures needed. This gentleman is celebrated for his eloquence, science, and religion, and was once a lawyer in a successful practice.

“In this college there should be a three years' course, each law year to be the same as the academic year of the University.

“The first two years should be devoted to abstract and elementary law, and the third and graduating year to the study of codes and practice ; and for this last year there should be organized a system of moot courts involving all questions of evidence, pleading and practice, and to facilitate the object of these courts, arrangements will be made under the Act of the Legislature for the use of the Law Library in San Francisco. This library belongs to the Law Library Association, and is of great value, being equal to any library of the kind in the United States.

“There will be published, as soon as the Directors can act, a curriculum of studies. I suggest that students, as provided by law, be permitted to matriculate, who reside in any part of the State, and to pursue their studies where they

reside. The terms and qualifications of applicants for admission will be made known. There will probably be no examination of graduates of colleges who are otherwise qualified, but non-graduates must understand that a limited knowledge, especially of the Latin language, will be required. Lectures and examinations for at least once a month will be had at San Francisco and at the University. There will be provision made for examination of applicants for advanced standing, so that it is expected there will be a number of students who will enter upon the second and third year at the commencement of the first term.

"The founder of this institution desires it to be understood that the term *student* is not limited to a young man without a diploma; for he never knew a good lawyer, no matter how well stricken in years, who was ashamed to acknowledge that he is as much a student as when he was in the days of his novitiate.

"This institution is intended to supply a substitute for the Inns of Court, the historic Inner Temple, a temple of the law, which shall extend its arms and draw within its portals all who shall be worthy to worship at its shrine, resulting in the coronation of its votaries as a reward for application, industry, and merit."

THE Supreme Court of Minnesota, in the *State vs. Armington*, held, in a decision rendered April 25, 1878, that a divorce granted by a Utah court, where neither of the parties ever acquired a *bona fide* residence in Utah and were both during the conduct of the divorce proceedings residents of Minnesota, was not valid in Minnesota and not a protection against the consequences of a second marriage, and a belief in its validity was not a defense to an indictment for bigamy.

Supreme Court of the United States,
OCTOBER TERM, 1877.

MEISTER, EXECUTRIX, vs. MOORE ET AL.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

MARRIAGE—WHEN VALID.—An informal marriage by contract, *per verba de presenti*, constitutes a valid marriage at common law; and in the absence of any positive statute of a State declaring that all marriages not celebrated in a prescribed manner shall be void, the rule is: whatever directions may be given respecting its formation or solemnization are merely directory, and not destructive of a common law right to form the marriage relation by words of common assent.

Mr. Justice STRONG delivered the opinion of the court: The learned judge of the Circuit Court instructed the jury that if neither a minister nor a magistrate was present at the alleged marriage of William A. Mowry and the daughter of the late Indian Pero, the marriage was invalid under the Michigan statute, and this instruction is now alleged to have been erroneous. It certainly withdrew from the consideration of the jury all evidence, if any there was, for informal marriage by contract *per verba de presenti*. That such a marriage constitutes a marriage at common law there can be no doubt, in view of the adjudications made in this country from its earliest settlement to the present day. Marriage is everywhere regarded as a civil contract. Statutes in many of the States, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle that where a statute creates a right and provides a remedy for its enforcement, the remedy is exclusive. No doubt a statute may take away a common law right, but there is always a presumption that the Legislature has no such intention unless it be plainly expressed. A statute may declare that no marriage shall be valid unless they are solemnized in a prescribed manner, but such an enactment is a very different thing from a law requiring all

marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of bans, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common law right to form the marriage relation by words of common assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes unless they contain express words of nullity. This is the conclusion reached by Mr. Bishop after an examination reached by the authorities. (Bishop on Marriage and Divorce, Sec. 283 and notes.) We do not propose to examine in detail the numerous decisions that have been made in the various State courts. In many of the States enactments exist very similar to the Michigan statute, but their object has manifestly been, not to declare what shall be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its rite rather than its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases the leading purpose is to secure a registration of marriages and evidence by which marriage may be proved, for example; by certificate of a clergyman or magistrate, or by an exemplification of the registry. In a small number of the States, it must be admitted, such statutes have been construed as denying validity to marriages not formed according to the statutory directions. Notably has this been so in North Carolina, and in Tennessee, where the statute of North Carolina was in force. But the statute contained a provision declaring null and void all marriages solemnized as directed without a license first had. So in Massachusetts it was early decided that a statute very like the Michigan statute rendered illegal a marriage which would have been good at common law, but which was not entered into in the manner directed by the written law. (*Milford vs. Worcester*, 7 Mass. 48.) It may well be doubted,

however, whether such is now the law in that State. In *Parton vs. Henry* (1 Gray, 119), where the question was whether a marriage of a girl only thirteen years old, married without parental consent, was a valid marriage, (the statute prohibiting clergymen and magistrates from solemnizing marriages of females under eighteen, without the consent of parents or guardians), the court held it good and binding, notwithstanding the statute. In speaking of the effect of statutes regulating marriage, including the Massachusetts statute, (which, as we have said, contained all of the provisions of the Michigan one), the court said, "the effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory only upon ministers and magistrates, and to prevent as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled. But in the absence of any provision declaring marriages not celebrated in a prescribed manner, or between parties of certain ages absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, though had in violation of the specific regulations imposed by statute." There are two or three other States in which decisions have been made like that in 7th Massachusetts.

We will not undertake to cite those which hold a different doctrine, one in accord with the opinion we have cited from 1 Gray. Reference is made to them in Bishop on Marriage and Divorce, sec. 283 et seq.; in Reeve's Domestic Relations, 199, 200; in 2 Kent's Com., 90, 91; and in 2 Greenleaf on Evidence. The rule deduced by all these writers from the decided cases is thus stated by Mr. Greenleaf: "Though in most, if not all, the United States there are statutes regulating the celebration of the marriage rites, and inflicting penalties on all who disobey the regulations, yet it is generally considered that in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be void, or that but certain magistrates or min-

isters shall solemnize a marriage, any marriage, regularly made according to the common law, without observing the statute regulations, would still be a valid marriage.

As before remarked, the statutes are held merely directory, because marriage is a thing of common right, because it is the policy of the State to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of the law.

The Michigan statute differs in no essential particular from those of other States which have generally been so construed. It does not declare marriages void which have not been entered into in the presence of a minister or magistrate. It does not deny validity to marriages which are good at common law. The most that can be said of it is that it contains implications of an intention that all marriages, except some particularly mentioned, should be celebrated in the manner prescribed. The 6th section declares how they may be solemnized. The 7th describes what shall be required of justices of the peace and ministers of the gospel before they *solemnize* any marriage. The 8th declares that in every case, that is, whenever any marriage shall be solemnized in the manner described in the act, there shall be at least two witnesses present beside the minister or magistrate. The 9th, 10th, 11th, 16th, and 17th sections provide for certificates, registers, and exemplifications of records of marriages solemnized by magistrates and ministers. The 12th and 13th impose penalties upon justices and ministers joining persons in marriage contrary to the provisions of the act, and upon persons joining others in marriage, knowing that they are not lawfully authorized so to do. The 14th and 15th sections are those upon which most reliance is placed in support of the charge of the Circuit Court. The former declares that no marriage solemnized before any person professing to be a justice of the peace or minister of the gospel shall be deemed or adjudged to be void on account of any want of jurisdiction or authority in such supposed minister or justice, provided the marriage be consummated with a full belief on the part

of the persons so married, or either of them, that they have been lawfully joined in marriage. This, it is argued, raises an implication that marriages not in the presence of a minister or justice, or one professing to be such, were intended to be declared void. But the implication is not necessarily so broad. It is satisfied if it reach not beyond marriages in the mode allowed by the act of the Legislature.

The 15th section exempts people called Quakers or Friends from the operation of the act, as also Menonists. As to them the act gives no directions. From this, also, an inference is attempted to be drawn that lawful marriages of all other persons must be in the mode directed or allowed. We think the inference is not a necessary one. Both these sections, the 14th and 15th, are to be found in the acts of other States, in which it has been decided that the statutes do not make invalid the common-law marriages.

It is unnecessary, however, to pursue this line of thought. If there has been a construction given to the statute by the Supreme Court of Michigan, that construction must in this case be controlling with us. And we think the meaning and effect of the statute has been declared by that court in the case of *Hutchins vs. Kimmell* (31 Mich. 126), a case decided on the 13th of January, 1875. There, it is true, the direct question was whether a marriage had been effected in a foreign country. But in considering it the court found it necessary to declare what the law of the State was, and it was thus stated by Cooley, J.: "Had the supposed marriage taken place in this State, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and co-operation of the parties, would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they were not. Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time live together profess- edly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties,

and which would subject them and others to legal penalties for a disregard of its obligations. This has become a settled doctrine of the American courts ; the few cases of dissent, or apparent dissent, being borne down by the great weight of authority in favor of the rule as we have stated it," citing a large number of authorities, and concluding, "such being the law of this State." We can not regard this as mere *obiter dicta*. It is rather an authoritative declaration of what is the law of the State, notwithstanding the statute regulating marriages. And if the law in 1875, it must have been the law in 1845, when, it is claimed, Mowry and the Indian girl were married, for it is not claimed any change of the law was made between the time when the statute was enacted and 1875. The decision of the Michigan Supreme Court had not been made when this case was tried in the court below. Had it been it would doubtless have been followed by the learned and careful circuit judge. But, accepting it as the law of Michigan, we are constrained to rule there was error in charging the jury that if they found neither a minister nor a magistrate was present at the alleged marriage, such marriage was invalid and the verdict should be for the defendants.

It has been argued, however, that there was no evidence of any marriage good at common law, which could be submitted to the jury, and, therefore, that the error of the court could have done the plaintiff no harm. If all the evidence given or legally offered were before us we might be of that opinion, but the record does not contain it all, and we are unable, therefore, to say the ruling of the court was immaterial. The case must, therefore, go back for a new trial. We do not consider the other questions presented. They may not arise on the second trial.

The judgment is reversed, and a new trial ordered.

THE NEW YORK LIFE INSURANCE COMPANY
VS.
EGGLESTON ET AL., ADMINISTRATORS, ET AL.

LIFE INSURANCE—FORFEITURE FOR NON-PAYMENT—NOTICE TO PAY AGENT—NOTICE NOT GIVEN.—The assured, residing in a State distant from the home office of the insurer, had always dealt with the agents of company, located either in his own State or within some accessible distance; he had originally taken his policy from, and had paid his first premium to, such an agent, and the company had always, until the last premium became due, given him notice what agent to pay, which became necessary because there was not a permanent agent in the vicinity; and the jury were charged that under these circumstances the assured had reasonable cause to rely on having such notice. *Held*: that this charge was rightly made.

In error to the Circuit Court for the Northern District of Mississippi.

This was an action on a policy of life insurance, issued by the plaintiff in error (the defendant below, a New York corporation doing business in the city of New York), on the 11th of November, 1868, for the sum of \$5,000, on the life of Edward C. Eggleston, a resident of the State of Mississippi, for the benefit of his children, Louisa and Thomas, and in consideration of an annual premium of \$306, payable (after the first premium) semi-annually, one-half on the 11th of November, and one-half on the 11th of May in each year. The policy contained the usual condition that if the premiums were not paid on or before the respective days named, together with any interest that might be due thereon, the company should not be liable. The following clause was added: “All receipts for premiums are to be signed by the president or actuary. Agents for the company are not authorized to make, alter, discharge contracts, or waive forfeitures.” Eggleston died on the 5th of January, 1872.

The defense set up on the trial was, that the policy was forfeited by the failure of the assured to pay the last installment of premium, which fell due on the 11th of November, 1871. The cause was tried by a jury, and the only question raised by the bill of exceptions, and brought here for review, is, whether the judge properly left to the jury the question of fact which was made by the plaintiffs below in answer to

the alleged forfeiture. The case presented on the trial, as shown by the bill of exceptions, was as follows:

The plaintiffs proved that the policy of insurance mentioned in the declaration was delivered and the first premium received thereon by one Stevens, a local agent of the defendant in Columbus, Mississippi, and that E. C. Eggleston, upon whose life said policy was issued, then and up to his death, resided in the immediate vicinity; that soon after issuance of said policy the agency of said Stevens was revoked and no other agent appointed at that place; that said Eggleston was notified by defendant to pay the next premium falling due to Johnston & Co., their agents at Savannah, Georgia, and that he was also notified to pay the subsequent premiums to B. G. Humphreys & Co., the defendant's agents at Vicksburg, Mississippi, except the one falling due November 11, 1871, all the other premiums falling due before the death of said E. C. Eggleston having been paid. It was also testified by sons of said E. C. Eggleston, and by Goodwin, the cashier of the bank through which the other payments had been made, and if any notice was given by the defendant to said Eggleston to whom and where the said premium due the 11th day of November, 1871, should be made, that they did not know it; and that said Goodwin had the money to pay the said premium, which would have been paid had the notice been given; and after said premium became due and payable, said Goodwin, for said Eggleston, telegraphed to Johnston & Co., at Savannah, Georgia, inquiring to whom payment should be made, who replied to telegraph to B. G. Humphreys & Co., at Vicksburg; that B. G. Humphreys & Co. replied to make payment to Baskerville & Yates, sub-agents, at Macon, Mississippi, who held the payment receipt. On December 30, 1871, a friend of said Eggleston tendered payment of the premium to Baskerville & Yates, which was refused unless a certificate of health was furnished; said Eggleston was then sick, and died on the 5th of January, 1872. One Williams, a clerk of Baskerville & Yates in their insurance business, and a witness for defendant, testified that on the 1st of November, 1871, he mailed a

notice post-paid to said Eggleston, addressed to him at Columbus, Mississippi, to make payment to Baskerville & Yates, agents at Macon, Mississippi, and that they held the proper premium receipt. Macon, Mississippi, it was found, is thirty miles from Columbus by railroad.

Upon this evidence the judge charged the jury as follows: "The non-payment of the premium is admitted, and if nothing more appears from the evidence the plaintiffs will not be entitled to recover. To avoid the defense, it is insisted by the plaintiffs that the non-payment was caused by the defendant not having given to the said Eggleston notice of the place where payment was required, and, therefore, the fault of the company, and not that of Eggleston or the plaintiffs. The onus of proving the cause for non-payment is on the plaintiffs. [If you shall believe from the evidence that the payments of the premiums had before that time been made to such agents as the company had designated from time to time, and of which and to whom said Eggleston was given notice by the defendant, and that no such notice was given to Eggleston before the time the non-paid premium fell due, and that as soon as he did thereafter receive such notice he did tender to the designated agent the premium due, and that such failure to pay was caused by the want of such notice, then the policy was not forfeited, and the plaintiffs will be entitled to recover the amount of the policy, with six per cent. interest from sixty days after the company was notified of the death of Eggleston, less the amount of any unpaid premiums, with like interest, up to the death of said Eggleston.] If you shall believe from the evidence that the notices before given were by letter through the mail, and that the agent of the company authorized to receive payments of the premium mailed to said Eggleston at his post-office such notice within such time as by due course of mail he would have received it, and within a reasonable time for Eggleston to make payment, then Eggleston will be held to have received such notice, and the plaintiffs will not be entitled to recover. The onus or burden of proof of such notice having been given is on the defendant." The defendant excepted to so

much of said charge as is included in brackets. Judgment for plaintiffs, and error assigned by defendant.

Matt. H. Carpenter, for plaintiff in error. The great error of the instruction is that it assumes that the company was then under the obligation to keep a local agent in the vicinity of the residence of the assured, and give the assured notice thereof. There is nothing in the law of Mississippi or of New York, or in the policy itself, which requires the company to do this. In *New York Life Ins. Co. vs. Davis* (95 U. S. 425), it was decided, in construing this form of policy, "that the legal effect of the policy itself was, that payment should be made to the company at its domicile." The case does not proceed upon the theory of any custom in relation to this branch of business, because no proof was offered that such custom existed; nor does the idea of custom enter as an element into the instruction excepted to. (See *Adams vs. Otterback*, 15 How. 539.) The fact that the agents of the company had notified the defendant in error to whom to make particular payment of premiums (which became due prior to November 11, 1871), was not such an act on the part of the company as amounted to a permission to the assured not to make payment until notified. The agent could not waive payment of the premium until notice was given by him to whom and where to pay it. On the contrary, the policy expressly prohibited him from doing so. This provision can not be set aside upon any act of the agent and the assured. The clause is as much a part of the contract as any other, and the defendant in error is as much bound by it; and it can not be set aside upon any act of the agent and the assured. (*Chase vs. Ins. Co.*, 20 N. Y. 52; *Buffum vs. Mut. Ins. Co.*, 3 Allen, 360; *New York Life Ins. Co. vs. Statham et al.*, 3 Otto, 31.)

The case, then, is this: The policy was completely forfeited by non-payment of premium November 11, 1871, and for more than a month thereafter, and not until the assured was near death, was any effort made to revive it. Therefore, there can be no doubt that all rights under the policy were lost.

P. Phillips and W. Hallett Phillips, for defendants in error. The premiums were to be paid to agents to whom the company sent the usual receipts. If, after the revocation of the power conferred on Stevens as local agent, the company had said to the assured, I will notify you as each payment becomes due, to whom I will send the receipt, it could not take advantage of the non-payment in November, when it had failed to give the promised notice. The obligation to give such notice can equally arise from the actions of the company, as from express words. The principle that no one shall be permitted to deny that he intended the natural consequences of his acts, when he has induced others to rely on them, is as applicable to insurance companies as to individuals. The doctrine of waiver, as asserted against the companies, to prevent the strict enforcement of conditions contained in their policies, is only another form for the doctrine of estoppel. (*Ins. Co. vs. Woolff*, 5 Reporter, 1.) There is no stipulation in the policy as to where the payments of premiums are to be made, and the law of Mississippi, made for the convenience and security of its citizens, requires insurance companies to have agents in the State, whose duty and responsibility are defined in Sections 57, 58, 59, Rev. Code, 1857, p. 303.

BRADLEY, J. (*After stating the facts.*) We have recently, in the case of *Life Ins. Co. vs. Norton*, 96 U. S. (S. C. 5 Reporter, 385), shown that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. The representations, declarations, or acts of an agent contrary to the terms of the

policy, of course, will not be sufficient unless sanctioned by the company itself. *Ins. Co. vs. Mowry*, 96 U. S. (S. C. 5 Reporter, 417.) But where the latter has, by its course of action, ratified such declarations, representations, or acts, the case is very different.

In the present case it appeared that the company had discontinued its agency at the place of residence of the insured soon after the policy was issued, and had given him notice by mail, from time to time, as the premium installments became due, where and to whom to pay them; sometimes at Savannah, several hundred miles, and sometimes at Vicksburg, a hundred and fifty miles from his residence. Such notice, it would seem, had never been omitted prior to the maturity of the last installment. The effect of the judge's charge was: that if this was the fact, and if no such notice had been given on that occasion, and the failure to pay the premium was solely due to the want of such notice, it being ready, and being tendered as soon as notice was given, no forfeiture was incurred. We think the charge was correct under the circumstances of this case. The insured had good reason to expect and to rely on receiving notice to whom and where he should pay that installment. It had always been given before; the office of the company was a thousand miles away; and they had always directed him to pay to an agent, but to different agents at different times.

Although, as we held in the case of *Ins. Co. vs. Davis* (95 U. S. 425), the legal effect of a policy, when nothing appears to the contrary, may be that the premium is payable at the domicile of the company; yet it can not be expected or understood by the parties that the policy is, in ordinary circumstances, to be forfeited for a failure to tender the premium at such domicile, when the insured resides in a distant State and has been in the habit, under the company's own direction, to pay to an agent there; and has received no notice that the contrary will be required of him. He would have a just right to say that he had been misled.

Let us look at the matter as it stands. The business of life insurance is in the hands of a few large companies, who

are generally located in our large commercial cities. Take a company located, like the plaintiff in error, in New York, for example. It solicits business in every State of the Union, where it is represented by its agents, who issue policies and receive premiums. Could such company get one risk where it now gets ten, if it was expected or understood that it was not to have local agents accessible to the parties insured to whom premiums could be paid instead of having to pay them at the home office in New York? The universal practice is otherwise. Local agents are employed. The business could not be conducted on its present basis without them. Now, suppose the local agent is removed, or ceases to act, without the knowledge of the policy-holders, and their premiums become due, and they go to the local office to pay them, and find no agent to receive them, are these policies to be forfeited? Would the plaintiffs in error, or any other company of good standing, have the courage to say so? We think not. And why not? Simply because the policy-holders would have the right to rely on the general understanding produced by the previous course of business pursued by the company itself, that payment could be made to a local agent, and that the company would have such an agent at hand, or reasonably accessible. We do not say that this course of business would alter the written contract, or would amount to a new contract relieving the parties from their obligation to pay the premium to the company, if they can find no agent to pay to. The obligation remains. But we are dealing with the question of forfeiture for not paying at the very day; and, in reference to that question, it is a good argument in the mouths of the insured to say: "Your course of business led us to believe that we might pay our premiums at home, and estops you from exacting the penalty of forfeiture without giving us reasonable notice to pay elsewhere." The course of business would not prevent the company, if it saw fit, from discontinuing all its agencies, and requiring the payment of premiums at its counter in New York. But, without giving reasonable notice of such a change, it could not insist upon a forfeiture of the policies for want of prompt

payment caused by their failure to give such notice. In the case of *Ins. Co. vs. Davis*, cited above, the agent's powers were discontinued by the occurrence of the war, of which all persons had notice; and the law of non-intercourse between belligerents prevented any payment at all; and the policy became forfeited and ended without any fault attributable to either of the parties. The case, therefore, was entirely different from the present; and it was in consequence of such forfeiture in the absence of fault that we held, in the case of *Ins. Co. vs. Statham*, 93 U. S. 24 (S. C. 3 Law and Eq. Rep. 304), that the insured was entitled to recover the equitable value of his policy.

In the present case it seems to us that the charge of the judge was in substantial conformity to the principles we have laid down. The insured, residing in the State of Mississippi, had always dealt with agents of the company, located either in his own State or within some accessible distance. He had originally taken his policy from, and paid his first premium to, such an agent; and the company had always, until the last premium became due, given him notice what agent to pay to. This was necessary, because there was no permanent agent in his vicinity. The judge rightly held that, under these circumstances, he had reasonable cause to rely on having such notice. The company itself did not expect him to pay at the home office; it had sent a receipt to an agent located within thirty miles of his residence; but he had no knowledge of this fact, at least such was the finding of the jury from the evidence.

We think there was no error in the charge, and the judgment is affirmed.

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Current Topics.

WE have just consummated an arrangement for the publication of the decisions of the Supreme Court of Nevada, the preparation of each having received the approval of the Supreme Court of the State before publication, thus rendering them official in their character. This will prove quite an important feature to our work, whose circulation already reaches nearly five hundred in this State.

ATTENTION is directed to the article appearing in this number entitled, "Can a married woman make a simple contract for the payment of money?" It is in review and criticism of the argument and opinion in the case of *Wood vs. Orford*, noticed in the JOURNAL (No. 16, p. 301). Our continued efforts to bring this important case before the profession are at last producing the effect desired which we hope will end with some more positive expression from the Supreme Court touching the question discussed in that case. When a question of such practical importance has been raised the profession and public alike are entitled to a clear and positive ruling by the supreme bench, leaving room for no possible doubt concerning it.

THE article, "Our Judicial System," in this number of the JOURNAL, will be found full of thoughtful and important suggestions on that subject which should claim the attention of the people and profession of this State at present.

There can be no doubt that the judiciary system of our State should undergo some radical changes in many of its

features, and the profession who by their experience are best informed in that regard should see that such changes as their experience suggests are made and incorporated in the new constitution.

While a free and full discussion might not end in a general or particular acceptance of the *minutia* of any one plan or system, it certainly would place before the people the acknowledged faults and shortcomings of the present system. We would be pleased to see the subject further discussed to which we open the pages of the JOURNAL.

In Wilson vs. S. P. R. R. Co. (an unwritten opinion), the Supreme Court affirms the order of the court below in granting a change of venue. The case presents these facts: Wilson sued the railroad company in Santa Clara County for the value of certain wool destroyed by fire while in the warehouse of the defendant, situated in San Benito County, alleged to have occurred by the negligence of the defendant.

A demand for change of venue was made, alleging that the motion was made upon the ground, that Santa Clara is not the proper county for the trial of said action; that the cause of action arose in San Benito County; that defendant is not a resident of Santa Clara County; and that the convenience of witnesses and the ends of justice will be promoted by such change.

At the hearing of said motion on September 3, 1877, the defendant, in support of the motion for a change of venue, read the complaint, the demurrer, the written demand for a change of venue, the notice of said motion, and the affidavit of F. E. Spencer in support thereof. The plaintiff declined to read any paper in opposition to said motion, and after argument by the parties the court declared the affidavit of Spencer to be insufficient to justify the granting of said motion, but continued the further hearing of said motion to September 10, 1877, and granted the defendant permission to file further or amended affidavits in the meantime in support of said motion, to the granting of which permission the plaintiff objected and excepted upon the ground that the affidavit

must be filed as used at the time of appearance in said action. In pursuance of said permission the defendant, on September 7, 1877, filed the affidavit of one Willcutt in support of said motion. At the hearing on September 10th, the plaintiff excepted to the reading of Willcutt's affidavit, but the court overruled the objection. No other paper or evidence were read or produced in support of said motion, and plaintiff declined to introduce any evidence whatever. The court granted the motion and plaintiff excepted.

S. F. Leib, of counsel for plaintiff, argued—1. That defendant made no showing of materiality of witnesses and the affidavit of merits were insufficient in not stating that the facts were "fully and fairly" stated to counsel, and the counsel himself made the affidavit, which was improper. 2. The court erred in permitting a new affidavit to be filed. The Code provides that the cause shall be tried where brought unless the defendant, "*at the time* he appears and answers or demurs," files an affidavit of merits. (C. C. P., Section 396.)

The new affidavit is not even an amendment of the first. It makes no reference to the first. The first was made by counsel, who was unauthorized by law to make it. (*Bailey vs. Taafe*, 29 Cal. 425.)

J. E. Foulds, for defendant, and S. W. Sanderson, of counsel, say: The order was made upon the ground of the convenience of witnesses and the furtherance of justice. That Section 396 of the Civil Code, on which it is presumed the exception to Willcutt's affidavit was based, relates only to cases in which the action *is not brought in the proper county*, and while it is true the motion was made on the ground also that San Benito was the proper county for the venue of the case, yet the motion was granted on the ground of convenience of witnesses and the promotion of justice, because the affidavit of Spencer was held insufficient and that of Willcutt's sufficient, which merely recited the names of witnesses and the evidence to be given by them, and the injury to be sustained if they were brought to Santa Clara County; and, further, that neither San Benito County

to which it was desired to remove the action nor Santa Clara was the residence of the defendants, so that Section 396 of the Code had no application whatever. 2. The affidavit filed on the appearance of the action was a proceeding within the meaning of the Code and was subject to amendment. Any pleading or proceeding may be amended. (Section 473, C. C. P.) 3. The motion was granted upon the third subdivision of Section 397, C. C. P. The whole matter lay in the discretion of the court and subject to revision only in cases of gross fraud.

Silver vs. Mullan (5935), an unwritten opinion by our Supreme Court, was a contest between applicants to purchase State lands under the five hundred thousand acre grant, and the court below found the following facts: That on the 24th day of December, 1867, the lands in controversy were surveyed by authority of the government of the United States, the plat of such survey approved by the Surveyor-General of the United States for the State of California, and filed in the U. S. Land Office at San Francisco.

That on the 25th of July, 1870, the Surveyor-General for the State of California, as the duly authorized agent, and in behalf of the State, made application to the Register of the U. S. Land Office at San Francisco to locate the said lands in part satisfaction of the grant of five hundred thousand acres for internal improvements made to the State under the provisions of the Eighth Section of the Act of Congress, approved September 4, 1841. That thereafter, on the 6th of September, 1870, the defendant Mullan presented and filed with the Surveyor-General his application and affidavit to purchase the land. That prior to the presenting and filing of said application and affidavit Mullan had entered and purchased from the State of California more than three hundred and twenty acres under the grant in lieu of the sixteenth and thirty-sixth sections, and that he had entered and purchased of the State of California, in his own name, many hundred acres of land in part satisfaction of said grant.

That prior to said presenting and filing the said Mullan

had entered and purchased from the State, in his own name, more than three hundred and twenty acres of land in part satisfaction of the five hundred thousand acres for internal improvements. That on July 14, 1871, the said lands were listed and certified over to the State of California in pursuance of the application of said Surveyor-General; that on the 31st day of January, 1874, the Surveyor-General of the State approved the application of said Mullan and authorized the County Treasurer to receive twenty per cent. in part payment of purchase money. That on February 5, 1874, Mullan conveyed to Harbin; that on February 5th Mullan made payment in full for said lands, and on March 11, 1874, a certificate of purchase was issued to Mullan by the Register of the State Land Office; that no other application for purchase was made prior to the issuance of said certificate; that Harbin afterward mortgaged the lands to McDonald, and McDonald purchased the same at the foreclosure sale. That after the purchase by McDonald, to-wit: On the 11th day of August, 1876, the plaintiff Silver presented to and filed with the Surveyor-General of the State his application and affidavit, first paying the legal fees therefor, to purchase the said lands. That he had not and has not entered any land in part satisfaction of the grant in lieu of sixteenth and thirty-sixth sections, which together with that sought to be purchased in the application and affidavit exceeds three hundred and twenty acres; that there was not a claim of any kind to said lands at the time of plaintiff's application, except the alleged claim of McDonald. That in December, 1876, the plaintiff filed a statement with the Surveyor-General and ex-officio Register of the State Land Office contesting the right of Mullan to purchase said lands and the certificate of purchase issued to him, and the contest was referred to the District Court of the Seventh Judicial District.

As conclusions of law the court state that the application and affidavit of Mullan is invalid and of no effect; that he had no right to purchase said lands, and that the certificate of purchase issued to him is invalid and of no effect; that defendant McDonald is not the owner of said lands, nor en-

titled to receive a patent therefor; that plaintiff is entitled to purchase said lands and to receive a certificate.

Judgment affirmed.

Geo. A. Nourse, for appellant.

Roche & Robinson, for respondent.

IN *City of Sacramento vs. Nat. Gold Bank of D. O. Mills & Co.* (an unwritten opinion), the Supreme Court affirmed the judgment of the court below—dismissing the action—submitted upon these facts: The city of Sacramento, by an ordinance passed in June, 1872, required the defendant to take out a city license of one hundred dollars quarterly, in advance, for the privilege of transacting, conducting, and carrying on the business of banking (the same not being a savings bank) within the limits of said city; that the defendant is a corporation, organized and incorporated under the laws of the United States, and that the invested capital in said banking business exceeds six thousand dollars, and that the defendant has failed and refused to take out said license; and further, that the defendant is a National Gold Bank, organized under and pursuant to the Act of Congress passed February 25, 1863, and the acts amendatory thereof and supplemental thereto; that its capital stock is three hundred thousand dollars, all of which is invested in United States bonds, not subject to taxation; that all of said capital stock has been subscribed and paid for, and is held and owned by private persons.

IN *Commonwealth vs. Mink*, Supreme Judicial Court of Massachusetts, November term, 1877, it was held, that suicide being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal; and if one attempting it kills another, though not intending his death, the act is criminal homicide, and, at the least, manslaughter. (*Reg. vs. Doody*, 6 Cox, C. C. 463; *Reg. vs. Burges, Leight & Care*, 258, S. C. 9 Cox, C. C. 247.)

OUR JUDICIAL SYSTEM.

Governments are necessary only because men are imperfect. If all were honest—were disposed to do unto others as they would have others do unto them, and were capable of discerning just what is right under all circumstances—laws and officers to enforce them would be useless. So long, however, as men remain what they are—weak, selfish, avaricious, passionate, ignorant, and often vicious—there must be government, which means, simply, that certain rules must be laid down defining the rights of person and property; that after those rules are put into words, there must be officials empowered to apply them to individual cases, deciding all matters in doubt, and other officials to enforce obedience to the laws so interpreted. Thus arises the three great divisions of sovereignty into the legislative or law-making power, the judicial or law-interpreting power, and the executive or law-enforcing power.

Our republican system is based upon the theory that the separation of these powers into different branches of government, so that no one of the three classes of officials shall exercise any essential part of the functions belonging to another, is necessary to the liberty of the people. The attempt to carry out this theory has made a very complicated and expensive plan of government, requiring numerous officials, with frequent elections and various checks to prevent abuse of power and malfeasance in office. We have a legislature which is the direct representative of the sovereign people, and is supposed to be the embodiment of their wisdom. This body can make or unmake laws, restricted only by the terms of the fundamental law. It is the will of the people putting in motion the whole machinery of government, subject to the check which the Executive may interpose by a veto that can be overcome by a two-thirds vote, and subject, further, to the more absolute check which the judicial department can give by declaring its acts unconstitutional. As all measures must originate with the legislative department, that is, of course, the superior power. The judiciary merely

interprets its will, and the executive enforces it. In addition to the legislative officials, we must have courts enough to inquire into all infractions of the law, and to try all causes of action arising between individuals, giving each a patient hearing. And then we must have a multitude of clerks, sheriffs, constables, policemen, and soldiers to assist the courts and carry out their decrees. Expensive and complicated as this plan of government is, however, no American citizen, who believes that liberty is above all price, would think of exchanging it for the simpler and cheaper but despotic plan by which a single individual and his dependents have the power of making, interpreting, and enforcing the laws. It only remains for us to scrutinize the machinery we have adopted, and see wherein it may be improved from time to time, simplifying it where it can be made more simple without weakening its republicanism, and changing it in any way to increase its efficiency without clothing any officer with too much power or discretion.

It is not my purpose in this article to deal with the legislative or executive branches of the State Government, but to discuss the judicial system only. Of that I wish to write in the view which I entertain, that the purpose of government is to secure the general welfare of the governed, and that there should, therefore, be as little governing as possible. The great problem for the practical statesman to solve in this country is to provide full protection to all impartially, and at the same time to furnish sufficient safeguards against the designs of the ambitious on the one hand and the dishonest on the other. This must be done by measures. Putting good men in office will not do it. Good men are sometimes weak, sometimes ignorant, often make mistakes, and too often become corrupt after obtaining office. Turning one party out of power and putting another in, is apt to be merely a change of thieves. Human nature is the same in all parties, and the world over it is governed chiefly by self-interest. In office or out of office, rich or poor, capitalist or laborer, lawyer or client, this is the great lever that moves the world. Men have other motives—as patriotism,

love, revenge, and the like—but in the end, and in ninety-nine cases out of a hundred, they yield to this. We must, then, make it the interest of officials to be faithful to their trust. If we want competent judges we must make it the interest of competent lawyers to be judges.

In devising a plan of a judicial system, no care should be spared to make it as simple as possible, and at the same time to make it capable of meeting the wants of the people promptly. This is by no means an easy task, as we may see by the history of the many attempts heretofore made in this country and in England. In this State we have come far short of it. Our system is both complicated and inefficient. We have no less than eleven different grades of courts: 1. The Court of Impeachment, composed of forty Senators elected for four years. 2. A Supreme Court of five judges elected for ten years. 3. Twenty-three district judges elected for six years. 4. Fifty-two county and probate judges elected for four years. 5. One county judge elected for four years. 6. One probate judge elected for four years. 7. One judge of a municipal criminal court elected for four years. 8. One judge of a city criminal court. 9. One judge of a municipal court of appeals. 10. Justices of the peace. 11. Police courts. In the LAW JOURNAL for November 24, 1877, is a reference to this system more at length, defining in detail the jurisdiction of these courts as fixed by the constitution and the statutes.

It has been found by experience that this system is not only complicated, but it is inefficient. The trial courts do not transact the business before them fast enough. Cases accumulate on the calendars, delaying litigants, greatly to their annoyance, and often to their ruin. The crowded calendars necessitate haste on the part of the judges, and they are frequently forced to decide causes without a thorough understanding of them. In consequence a great many appeals are taken, crowding the calendar of the Supreme Court. That Court often finds errors, reverses judgments, and sends the cases back for new trials. In this way a citizen who is compelled to invoke the aid of the courts for justice is sometimes delayed for years and impoverished by the costs of the

litigation. This should not be so. Perhaps it can not be altogether avoided under any system. But we can certainly devise some machinery to lessen the evil.

I propose the following plan :

1. Increase the jurisdiction of the justices of the peace to cases involving \$1,000 and less, instead of \$300 and less, as at present, and to all cases of misdemeanor. Permit trials by jury in these courts, and new trials, but allow appeals upon questions of law only. Make them courts of record, and prescribe educational qualifications for the office of justice of the peace. In this way summary justice may be had in the great majority of cases, to the immense relief of the higher courts and to the advantage of all.

2. For the district, county, probate, and criminal courts, substitute municipal courts—one for each county or city, and county capable of expansion into as many branches as may be necessary. In small counties one judge can attend to all the business—civil, probate, and criminal. In larger counties there may be a branch, to be styled the Municipal Probate Court, or the Municipal Criminal Court. In the city and county of San Francisco there may be a Municipal Probate Court, a Municipal Criminal Court, and as many Municipal Courts for civil cases as the business may require, to be designated Municipal Court No. 1, No. 2, and so on. Give the Municipal Court jurisdiction of all cases of felony, of civil causes involving more than \$1,000, of cases at law which involve the title or possession of real property, of the legality of any tax, assessment or municipal fine, of special cases—in short, of all cases not within the jurisdiction of the Justices of the Peace or Police Courts, together with the usual jurisdiction as to writs. Let it also have appellate jurisdiction of cases from the Justices' Courts, and allow appeals from its decisions in all cases to the Supreme Court upon questions of law alone.

3. Make the Supreme Court to consist of nine justices to begin with, the number to be increased or diminished at any time upon a popular vote at a general election, after a vote to that effect by two-thirds of a full Legislature, such change

to be so made as to preserve the number of justices capable of subdivisions into sections of three. Let the court subdivide the State into circuits and assign three of their number to each circuit; appeals from the Municipal Courts within that circuit to be heard by the justices assigned to it. All the sections of the court to be in session continuously in their respective circuits, except during two months of the year, when semi-annual terms of one month each shall be held at the State capital by the full court to hear appeals from the circuits. Appeals from the circuits to be allowed only in cases involving constitutional questions, or where a former decision of the Supreme Court has been overruled, or where one of the justices certifies that in his opinion there is good ground of appeal. Upon the hearing of an appeal from a Circuit Court, the judges of that circuit to be excused from sitting. A majority of the judges on the bench—not less than four—to decide in all cases.

4. All the judges of the Supreme and Municipal Courts to be appointed by the Governor and confirmed by the Senate, from members of the legal profession who have been admitted to practice, and to hold office during good behavior. Provide a convenient plan for the trial of incompetent, dishonest, or negligent judges, and have them removed for cause only after a fair trial. Prohibit them from being candidates for any office or taking part in politics while occupying the position of judge. The Justices of the Peace and of the Police Courts may be chosen by the Boards of Supervisors of the several counties or elected by the people.

This plan has, at least, the merit of greater simplicity than the present system. Under it the Justices of the Peace can grant immediate relief in that vast multitude of cases where small claims arise, and can punish for petty offenses, thus giving more time to the higher courts for graver causes. At the same time any abuse of power by them can be checked by appeal to the higher courts. The Municipal Courts would be the place where the more important litigation would be conducted. There should be machinery provided to facilitate the prompt dispatch of business, so that when the par-

ties are ready causes may be heard at once, or without oppressive delay, and to prevent postponements merely for the purpose of delay. In a county where business is very great, and the regular courts fall behind with business, special courts might be allowed temporarily until the calendars are relieved. Such courts to be designated "Special Municipal Court for the City and County of San Francisco, No. 1," etc. The judge of the court to be appointed by the Governor upon satisfactory petition showing the necessity therefor; his judgment to be of equal validity with any other, and his records, as in the case of the other courts, to be filed with the clerk of the county. Or parties might be authorized to agree upon a referee to decide special cases; or if, after a certain time, the court can not hear a case by reason of the pressure of other business, and the parties fail to agree upon a referee, the judge; upon the application of either party, might be empowered to appoint a competent lawyer to try the case with all the formalities and effect of the regular court, the costs to be assessed by the judge unless agreed upon by the parties.

As to the propriety of the appointment of the justices of the higher courts by the Executive instead of electing them few intelligent people will differ, and the only question to be considered is whether the change can be made. It is difficult to conceive any reason why it should meet with serious opposition from any source. The Governor is the representative of the people elected by popular suffrage for a short term of years and directly responsible to them for his acts. He is generally a good representative and a faithful officer. Officers appointed by him are usually better than those elected by the people, as they ought to be, because he can, if he will, take more time and make more judicious selections than nominating conventions, while the responsibility which is divided among the numerous members of the convention who are soon forgotten is concentrated upon him. If he makes bad appointments he will lose his standing with the people and fail of further promotion or favor. We have too many elections now, and they are very expensive. By this change

we can do away with one and thus save a large sum of money. We also have to vote for too many officers—so many that they can not be known to the average voter, and they intrigue for place to such an extent as to make office holding of doubtful respectability instead of honorable as it should be. The man who will not seek office by mingling with the wire pullers will not be apt to get it. As a rule, the most industrious and competent lawyers do not and will not engage in such scrambles for place. It is not clothing the Executive with too much power, for he is only a short time in office and can not abuse the power if he would. He is already allowed to make temporary appointments of judges; he selects all our notaries and other like officials. Why not trust him with this duty? If we do add a little to the dignity of his station we will but serve ourselves. The Executive of a State ought to be to the State what the President is to the nation. The latter appoints all our federal judges, and appoints them for life; the plan has worked well. The same power appoints all the officers of the army and navy, the foreign representatives, the collectors of revenue, and all the other thousands of public servants, down even to the post-mistress in the village post-office. Is it not ridiculous to manifest so much concern for the patronage of State governors, where, in any event, the power is comparatively trifling—certainly not at all dangerous to our liberties? So long as the people control the power of making laws and of executing them by direct representatives there can be no danger in having those who merely explain them chosen by their agents.

I have suggested a life tenure or term during good behavior, because it is in harmony with the federal system, and it would certainly improve the character of our judiciary. A judge who must be elected by the people divided into political parties, with one party in the majority one year and in the minority the next, can never feel secure of being sustained no matter how faithfully and well he may do his work. Each political party will present its candidate, and the people vote for or against them with little regard for personal

qualifications, but chiefly as partisans, when in fact the candidates have nothing scarcely to do with political questions. The present plan, therefore, is a constant temptation to our judges to step aside from their high functions as impartial ministers of justice and bid for popular favor. Judges should feel secure of their offices so long as they do their duty honestly and efficiently. Then, with a life support assured, even our best lawyers, however poor, can afford to abandon a good practice to enter the public service.

JAMES A. WAYMIRE.

CAN A MARRIED WOMAN MAKE A SIMPLE CONTRACT FOR THE PAYMENT OF MONEY?

In *Wood vs. Orford*, decided by the Supreme Court of this State, October 12th, 1877, the question is presented in the restricted form in which it is proposed to be considered here, and our inquiry may be confined to the question, whether or not that decision is sound.

The defendant, a married woman, was sued with her husband on a simple promissory note executed by her when married to a former husband, neither the note nor the allegations of the complaint showing that it had relation to her separate property. The decision is expressed in the following brief terms: "On the facts disclosed by the pleadings there can be no personal judgment against the husband. It is therefore ordered that judgment be, and it is hereby modified by limiting the same to the defendant Mary J. Orford." It is to be regretted that on a decision so novel and important no reasons should have been given, and we can therefore only look to the arguments of the counsel for the grounds of the determination of the court. It is admitted that by the common law and the laws of this State before the adoption of the Codes, a married woman would not have been obligated by such a contract. The question then resolves itself into the inquiry whether the Codes have changed the law as it previously existed in this respect.

The sections of the Codes applicable.

Section 158 of the Civil Code provides as follows : "Either husband or wife may enter into an engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried."

Section 167 as first enacted read as follows : "A wife can not make a contract for the payment of money."

As amended in 1874 it reads, "The property of the community is not liable for the contracts of the wife made after marriage, unless secured by a pledge or mortgage thereof executed by the husband."

Section 4468 of the Political Code reads as follows : "The common law of England, so far as it is not repugnant or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."

Section 1556 of the Civil Code is as follows : "All persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights."

The arguments in favor of the decision considered.

It is argued that Section 1556 capacitates married women to contract on all subjects. That the only limitation set on that capacity was created by Section 167, and that upon its repeal or substitution in 1874, that capacity became universal so far as to bind her separate property. Let us see whether the argument will stand examination. Under the laws existing at the time of the passage of the Codes, the capacity of a married woman to contract was so enlarged that it may be said to have become the general rule, and Section 1556 appears to be but a general classification of civil status. She is rated generally in the wide class of those who are capable of contracting, and viewed in this aspect it was not intended to determine or enlarge her powers of contracting. On the other hand, the passage of Section 167 originally appears to have been a mistake; it was a restriction of the powers of married women contrary to the common law as we have received it modified by the rules of equity, and contrary to the effect of our then existing laws. Its repeal did not

have the effect to enable married women to make every kind of contract, for it left the provisions of Section 4468 of the Political Code in full effect. But if Section 1556 is to be considered a grant of power to contract, it does not repeal nor contradict the provisions of law then in force or thereafter enacted, prohibiting her in particular cases from contracting. This follows by a rule of construction too thoroughly established to be considered here. If Section 1556 bears the meaning claimed for it, then it is a general provision of universal operation, and in respect to it all laws restricting the powers of married women to contract would be particular ones, and such must have full operation. But Section 1556 does not in express terms repeal any other provision of law, and if it does repeal any, it can only be by implication. But repeals by implication can only be made when the laws repealed are repugnant to or inconsistent with the new law; repeals by implication are not favored, and when the language of the new law will bear a construction admitting the continuation of previous laws, those laws will not be deemed repealed. Now we have but to look to the plain language of Section 1556 to see that it does not repeal any law prohibiting married women from contracting, in any particular case or in any particular manner. Surely the inclusion of married women in the class of persons who can contract is not an enactment that she can contract on all subjects, and in any manner, and is not repugnant to or inconsistent with a law which declares that she can not contract in a particular manner or on a particular subject. Such a proposition stated as a syllogism is this—*married women can contract; making a simple promissory note is contracting; therefore married women can make a simple promissory note.* The fallacy is plain, the major premise is not universal, therefore the conclusion is false. It is too plain for argument that the language does not give a universal power to contract, but is fulfilled by a limited power, nor does it pretend in that section to say on what subject contracts may be made; and it follows as a conclusion that it can not be repugnant to or inconsistent with any law prohibiting contracts to be made in any particular case.

The cases in which minors and persons of unsound mind can contract are expressly declared and all other cases are negative. Why, if the Legislature intended to repeal the laws in force restricting the power of married women to contract, did it not adopt the same language which it had in the same connection used to repeal the laws enlarging the capacity of the excepted class, to wit : by expressly negativing the existence of such laws? And why proceed, *ex industria*, to determine by different laws in the cases in which married women may contract, as well at the time of the passage of the Codes as of the amendatory acts of 1874 and the repeal of Section 167, if by virtue of Section 1556 they were empowered to make *all* contracts? Section 158 fully empowers married women to make all contracts *respecting her property*, and while this is a definite enlargement, it may also be accepted as the true limits of her power. But in support of the decision it has been argued that this very section grants the power to married women to make the contract considered therein, and the argument is this—money is property, therefore a contract to pay money is a contract *respecting property*. This argument was hung out as an electric light by the counsel in the case, when in fact it was nothing but an *ignis fatuus*, a sophistry, or sort of play on words. A simple agreement to pay a sum of money is not a contract *respecting property* ; it is a personal obligation to *do a thing*—it respects the action and not the money. If it were a contract respecting property its enforcement should be by a proceeding *in rem*—against the property; on the contrary, it is by a *personal* judgment, and not until the judgment lien, or lien of attachment, or execution is had can it become a proceeding respecting property, and then on a new species of property and by virtue of the proceedings in court. If the contract had relation to a specific package of coin, or perhaps a specific deposit, it *might* be said to be a contract respecting property. In justice to the court it is not to be supposed that they based their opinion on such a reason. It shows, however, the danger of rendering an important decision without giving the grounds thereof. Decisions even of the highest

courts can only stand on a solid foundation if important general principles are involved. Where is the support of this one? Will the architects maintain it? CRITICUS.

Notes of Cases.

Subscription to Stock of Corporation—Fraud. 1. Contracts to take stock in a corporation stand upon the same footing as all other conventional obligations. If induced by fraud, they create no obligation, and the injured party has a right to have them abrogated. The rule is universal, whatever fraud creates justice will destroy. For the general rule no authorities are necessary, but the following cases are cited to give instances of its application to the class of contracts under consideration: *Central R. R. Co. of Venezuela vs. Kisch*, L. R. 2 H. L. 99; *Smith's Case*, L. R. 2 Ch. Ap. 604; *Kent vs. Land and Brick-making Co.*, L. R. 4 Eq. Cas. 588; *Ross vs. Estates Investment Co.*, L. R. 3 Eq. Cas. 122; s. c., on appeal, L. R. 3 Ch. Ap. 682; *Smith vs. Reese River Co.*, L. R. 2 Eq. Cas. 264. The subjection of contracts of this kind to the rule above stated is thus plainly expressed by Lord Romilly, in the case first mentioned: "Contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like the contracts between any two individuals. If one man makes a false statement which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual." And it has also been held, that if a person is induced, without fraud, to enter into a contract of this description by a promise, on behalf of the corporation, that it will aid him in a specified mode, to pay his subscription, and the promise is not kept, his contract will not be enforced. (*Burrows vs. Smith*, 10 N. Y. 550; *Ang. & Ames on Corp.*, § 531.)

2. An oral contract of subscription will not be enforced under a charter requiring that such contracts shall be made in writing. (*Pitts. & Con. R. R. vs. Clarke*, 5 Casey, 145; *Pitts. & S. R. R. vs. Gazzam*, 8 Casey, 340.) 3. Where a fraud is committed in the name of a corporation, by persons having the right to speak for it, for their personal benefit, they will be made to answer personally for the injury inflicted by their fraud. *Vreeland vs. N. J. Stone Co.* New Jersey Court of Chancery, 2 Stew. (Eq.), 188. VAN FLEET, V. C.

Foreign Attachment—State Comity—Appointment of Receiver in another State Recognized as against Attaching Creditor who is a Citizen of the same State. In pursuance of the comity established between the different States, the courts of this State will recognize the appointment of a receiver in another State, unless his claims come in conflict with the rights of our own citizens. B and R, citizens and residents of Virginia, by process of foreign attachment issued in Pennsylvania, attached certain property of a railroad company located and doing business in Virginia. Shortly prior to this attachment, the railroad, by decree of a Virginia court, had passed into the hands of receivers, who claimed the fund attached as against the attaching creditors. *Held*, that the receivers were entitled to the fund, and that the equitable transfer to them of their debt in Virginia was binding upon B and R in Pennsylvania. It is true that the plaintiffs below have a right to sue in this State, just as one of our own citizens might, as we held in *Morgan vs. Neville* (24 P. F. Smith, 52). But while suit for the debt may be maintained, it is not a legal consequence that the extra-territorial act of an appointment of a receiver in Virginia must be rejected as a defense against these plaintiffs. Such an act, like an assignment by operation of extra-territorial law, rests upon the doctrine of comity, to which our State courts lend their aid when not in conflict with the rights of our own citizens. But this comity should not be exercised where the Virginia court would not itself justify its enforcement. Now, it is clear

that as to these plaintiffs, who were citizens of Virginia, the appointment of a receiver was not extra-territorial, but was an act binding on them which the Virginia court would enforce as to them, had their action been brought in Virginia. Then, certainly, they have no right, after the appointment of a receiver by a court within their own State, binding on them there, to attempt to avoid its effect by escaping from its jurisdiction and coming here to ask us to infringe the comity we owe to the acts of their own courts within their jurisdiction. Instead of comity, this would be unfriendliness ; for they ask us to aid them in a violation of their own law. Our own citizens would be protected against the extra-territorial act in a proper case, because they are not bound by it ; and our assistance given to the extra-territorial act resting only in comity, would not be given at the expense of injustice to them. The case does not fall within the first clause, 2d section of the 4th article of the Constitution of the United States, that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." As to a citizen of Virginia, the appointment of a receiver in Virginia, binding on him there, is not set aside by this clause of the Constitution. The equitable transfer of the debt there is binding on him here. *Bagley vs. Atlantic, Miss. & Ohio R. R.* Supreme Court of Pennsylvania, 5 W. N. 263. Opinion by AGNEW, C. J.

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Current Topics.

ELEVEN applicants for license to practice law presented themselves at the opening of the present term of the Supreme Court and were examined as to their legal attainments and qualifications. Mrs. Mary Young, of Sacramento, was among the number, being the first female applicant under the new statute permitting women to practice law. We learn that her examination was very creditable, she standing above the general average of the class. All were rejected, however, except Mr. W. H. G. French, who passed a satisfactory examination.

A SUBSCRIBER of high standing in the profession contributes the article "Can a married woman make a contract for the payment of money?" appearing in this number. The article is in answer to one by "Criticus" which appeared in our last week's issue. It is certain that the best lawyers of our State are divided in their opinions as to this question; and we fear the decision in *Wood vs. Orford*, though the issue was certainly made, will not have the effect to dispel all doubt in the minds of those holding the views of "Criticus."

As yet no opinion has been filed at the present term of our Supreme Court. They will be collected, prepared, and reported in the JOURNAL immediately after their rendition. The profession may safely rely on the JOURNAL for all the opinions, each prepared with an accurate and full statement of facts and syllabus.

IN *Hampshire vs. Wickens*, 38 L. T. Rep. (N. S.) 408, the

English High Court of Justice, chancery division, recently held that where the defendant entered into an agreement to take a lease of a dwelling-house, to contain all usual covenants and promises, and the lease tendered to the defendant contained a covenant not to assign without the lessor's consent, such consent not to be withheld to a respectable and responsible tenant, such a covenant was not a usual one and the plaintiff could not enforce the agreement.

CAN A MARRIED WOMAN MAKE A CONTRACT FOR THE PAYMENT OF MONEY?

The communication which appeared in the JOURNAL over the *sobriquet* of "Criticus," reviewing the decision in the case of *Wood vs. Orford*, omits to refer to Section 4 of Civil Code, which establishes a very important rule of construction, to-wit:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." Now, as by Section 158, married women may make any contract "*respecting property*," and as by Section 1556 "*all persons are capable of contracting, etc.*," it follows that a liberal construction of the statute with a view to effect its objects must confer upon a married woman the power to incur an obligation, or else she can not become a party to an executory contract; for executory contracts respecting her property necessarily incur obligations—such for instance as agreements to sell, lease, improve, or incumber.

If a married woman should employ a mechanic to build a house on her land, and the mechanic were to build it, would she be under no obligation to pay for it? If none, then the mechanic could have no lien on the property, because no lien can be acquired where there is no obligation arising from *contract*. (Phillips on Mechanics' Lien, 112.)

Criticus in his caption speaks of a "*simple contract*." What is the difference between a "*simple contract*" and any other kind so far as the question under discussion is concerned? Every executory contract incurs an obligation of some kind, and if a married woman can not make an executory contract "*respecting her property*," then the statute is narrowly and not liberally construed, and its object is not effected.

The qualifying words "*respecting property*" evidently were intended to exclude the inference that husband and wife could make a contract affecting their personal status or marital relations, and was not intended to limit their power to make any contract affecting their property only.

Section 1556, investing all persons with power to contract, except etc., without restriction, is broad enough to cover all subjects and all sorts of obligations.

Section 159 of Civil Code reads: "A husband and wife can not, by any contract with each other, alter their legal relations except as to property, etc." This section, read in conjunction with Section 158, explains the intention of the law maker.

DNOB.

PAYMENT OF NOTES PAYABLE AT BANK.

It is the popular conception that a bank is bound to pay a note made by one of its customers and payable at its counter, provided it have sufficient funds of the drawer on deposit; but this, like a great many other popular notions of law, if in any respect true, is subject to numerous limitations and exceptions.

It is well settled that the deposit of money in a bank generally creates simply the relation of debtor and creditor between the bank and the depositor. (*Marsh vs. Oneida Central Bank*, 34 Barb. 298; *Ketchum vs. Stevens*, 6 Duer. 463; affirmed, 19 N. Y. 499; *Beckwith vs. Union Bank*, 5 Seld. 211; *Commercial Bank vs. Hughes*, 11 Paige, 94; *Dykers vs. Leather Manuf. Bank*, Id. 612; *Bank of Republic vs. Millard*,

10 Wall. 152; *First Nat. Bank vs. Whitman*, 94 U. S. 343; *Aetna Nat. Bank vs. Fourth Nat. Bank*, 46 N. Y. 823; S. C., 7 Am. Rep. 314; *Carr vs. Nat. Security Bank*, 9 Am. Rep. 6; *Case vs. Henderson*, 8 Id. 590; *Re Bank of Madison*, 5 Biss. 515.) And it has been, therefore, frequently held that there is no privity between the holder of a check and the bank on which it is drawn, and that, therefore, such holder has no right of action against the bank for refusing to pay the check on presentation. *Aetna Nat. Bank vs. Fourth Nat. Bank*, *supra*; *Carr vs. Nat. Security Bank*, *supra*; *Case vs. Henderson*, *supra*, and the other cases above cited. It is held otherwise in Illinois and Kentucky, but the unbroken current of authority elsewhere is to the effect above stated. See *Union Nat. Bank vs. Ocean County Bank*, 22 Am. Rep. 185, and note.

If a bank is not bound to pay the checks of its customers it is equally not bound to pay their notes drawn payable at the bank. In *Aetna Nat. Bank vs. Fourth Nat. Bank*, Allen, J., delivering the judgment of the court, said: "An acceptance or promissory note thus payable (that is payable at the bank) is, if the party is in funds, that is, has the amount to his credit, equivalent to a check; and it is in effect an order or draft on the banker, in favor of the holder, for the amount of the note or acceptance."

That case shows very conclusively that a bank is under no legal obligation to a stranger holding a note payable at its counter. The facts were these: The Florence Mills having a balance of \$694 to its credit with the defendant bank, sent to it on April 2d, by mail, a check on another bank for \$4,895, with a letter containing the direction: "Please credit our account and charge us our note of \$5,000 due the 4th inst." The check was received and credited on the 3d, and on the same day the defendant paid a past due note of \$5,000 of the Florence Mills, payable at defendant's bank and charged it to the account. On the 4th the plaintiff presented the note referred to in the letter, and payment being refused, brought suit. The court held that the plaintiff could not recover. The learned judge remarked *arguendo* that "this

payment was valid as against the customer of the defendant, the maker of the note," but there may be room for doubt about that. There was a specific direction accompanying the deposit as to its application, and it is generally held that where moneys are deposited for a specified purpose with notice to the bank, or where it is accompanied by specific directions as to its application, the bank is bound to follow such directions, and can not even apply the deposit to a debt due it. (*Bank of the United States vs. Macalester*, 9 Penn. St. 475; *Smuller vs. Union Canal Co.*, 37 Id. 68; *Farley vs. Turner*, 26 L. J. Ch. 710.) Thus, in *Wilson vs. Dawson* (52 Ind. 513), the principal on a promissory note due a bank, after maturity of the note, deposited and checked out more money than was sufficient to pay the note, but under a special agreement with the bank when deposits were made that they were to be used to pay checks, and it was held that the moneys could not have been applied on the note, and that a surety thereon was not discharged. So if a depositor notify a bank not to pay a note drawn payable at its counter, it is bound to comply. (*Egerton vs. Fulton Nat. Bank*, 43 How. Pr. 216.)

But the depositor only can sue a bank for failing to follow his directions as to the application of a deposit; no right of action exists in the holder of a note. And it may be doubted whether a bank would be liable to a depositor for failing to pay a note or check in the absence of a specific agreement so to do. In *Thatcher vs. Bank* (5 Sandf. 121), it was held such an agreement would be implied between a bank and its customers, but must be proved as between the bank and those not regularly dealing with it.

It may be stated as a general rule that a bank has a right, in the absence of instructions to the contrary, to apply moneys on deposit, to the payment of notes and checks drawn upon it, or payable by it. (*Mandeville vs. Union Bank*, 9 Cranch, 9; *Griffin vs. Rice*, 1 Hilt. 184.) But the Supreme Court of Illinois seems to hold a different view.

In *Wood vs. Merchants' Saving Co.* (41 Ill. 267), the position seems to have been taken that a bank has no right to pay a

note payable at its counter out of funds on general deposit without some special authority or direction so to do. The action was on a note payable at the banking-house of one Conrad, and the defense was that the maker had money on deposit with Conrad when the note was due; that the holder without procuring such money, as he had "the right and opportunity" to do, had the note marked "good" and departed, and that afterward the banker failed. The court said — "Had the holder this right, and had Conrad any authority whatever to pay the note, out of the funds on deposit in his bank to the credit of the makers? The custom sought to be established among bankers has nothing, in our judgment, to do with the question. What is the effect of making a note payable at a particular place? Was it ever before heard, that the effect was to transfer, *ipso facto*, the money at the place belonging to the makers, absolutely to the holder, on his presenting the note at the place of payment? There is no such rule, in any commercial country, of which we have any knowledge. It is a well-settled doctrine in the courts of England and this country, and of this court, that the holder of such paper is not under any obligation, even to present the note for payment when payable. The maker, in an action against him on such note, may plead, in bar of damages and costs, a readiness to pay at the time and place.

"We do not understand that the fact of making a note payable at a particular place amounts to an agreement that the maker may make a deposit at the bank of the amount of the note, and thus discharge his obligation, and that the money so deposited is at the risk of the holder of the note. It is a mere designation of the place where the note is to be paid, not of the person to whom the money is to be paid. By the terms of the note, the money was to be paid by the makers to the payee, not to Conrad, but at Conrad's banking house. As put by appellee's counsel: "If the holder of the note was present, at the time and place of payment of the note, and the maker was there, and tendered the amount, and the holder refused to accept it," this would be no bar to a recovery by suit; and unless the tender was kept good, by

bringing the money into court, it would not bar a recovery for damages and costs. This position is sustained by the case of *Butterfield vs. Kenzie*, 1 Scam. 445, where the court cite *Woolcott vs. Van Santvoord*, 17 Johns. 278; *Caldwell vs. Cassidy*, 8 Cow. 271; *Stanton vs. Bishop*, 3 Wend. 20; *Bailey on Bills*, 203; 4 Litt. 225; 11 Wheat. 171; and *Wallace vs. McConnell*, 13 Pet. 130, is referred to in note by reporter, to the same effect. To the same point is the case of *New Hope and Delaware Bridge Co. vs. Perry et al.*, 11 Ill. 471, citing the same cases.

"The money on deposit with Conrad belonged to the maker of the note; it was his money, and under his control. If this be so, if the holders of this note were under no obligation to present this note at Conrad's counter, does the fact that it was presented change the liability of the parties in any way?

"Wherein consisted the 'right and opportunity' of the holder to receive this money from Conrad, except by the actual payment of the money by the maker, by himself or Conrad? Conrad had no right to pay it, nor could the money be taken to pay it, except by means of the verbal order, check or draft of the maker and depositor. No one taking such paper has ever supposed that the bank, at which it was made payable, was bound to pay the note on presentation, or that any obligation was imposed upon it so to do. It is not according to the usage of banks to pay out money except upon checks or drafts drawn by its creditors having funds in the bank. No case can be found, where, in such case, a bank has been considered as authorized to pay a note made payable at its banking-house, without the express direction of the maker, or in the absence of any check or draft by him, appropriating his money deposited there to such purpose. Nor is there any obligation resting on the bank to pay, for the bank may have claims against the deposit superior to those of the holder of the note. "Holding, as we do, that neither 'the right nor opportunity' existed to the holder to receive this money at Conrad's bank, the makers of the note are not released."

An interesting question arose in *Nat. Bank vs. Smith* (66 N. Y. 271). The plaintiff, the bank, discounted and held a note drawn by a customer, payable at the bank and on which the defendant was an indorser. The note was dishonored and duly protested, and notice given to the indorser. Afterward the maker made a deposit with plaintiff of the same amount as the note but without any direction as to its application. The money so deposited was used in payment of a note of the same maker's falling due at the bank two days after the deposit. The court held that the bank was not bound to apply the money to the payment of the note held by it, and that the indorser was not discharged.

Had the bank held funds of the maker sufficient to pay the note when it fell due, it would probably have been bound, so far as the indorser was concerned, to apply them to the note. (*Wright vs. Austin*, 56 Barb. 13; *Gary vs. Cannon*, 3 Ired. Eq. 64.)

Where funds in a banker's hands have been applied to the payment of notes and acceptances made payable at the bankers, though without any further authority, that is a defense to an action by the depositor for dishonoring his checks. (*Keymer vs. Laurie*, 18 L. J. Q. B. 218.)

The certificate of a bank where a note is payable, that it is "good," is merely information that the maker has funds in the bank. (*Irving Bank vs. Wetherald*, 36 N. Y. 335.)

As to the right of a bank to retain and apply a deposit to a demand held by the bank against the depositor, see *Dawson vs. Real Estate Bank*, 5 Ark. 283; *Ford vs. Thornton*, 3 Leigh. 695; *State Bank vs. Armstrong*, 3 Dev. 519; *McDowell vs. Bank*, 1 Harr. 369; *Whittington vs. Bank*, 5 Harr. & J. 489.—*Alb. Law Journal*.

Supreme Court of Pennsylvania.

JANUARY 7, 1878.

DUFF vs. WILLIAMS.

LIABILITY FOR REPRESENTATION AS TO CREDIT OF ANOTHER. — Plaintiff having money to loan, asked defendant if he wished to borrow it. Defendant said no, but his brother did. Plaintiff asked if the brother was solvent, and defendant, honestly believing him to be so, said he was. Plaintiff relying on this made the loan. *Held:* that defendant was not liable for a loss thereof through the brother's insolvency.

Action for damages arising out of an alleged deceit on the part of John C. Duff, the defendant below, whereby Robert Williams, the plaintiff below, was induced to loan money to defendant's insolvent brother, Agnew Duff.

Plaintiff having a sum of money to loan, asked defendant if he wished to borrow it. He said no, but he thought his brother would like some. Plaintiff asked him if his brother was good for the amount, and he said he was. At that time defendant believed his brother to be solvent, and made the representation in good faith. Thereafter plaintiff called upon the brother and lent him the money, taking his note therefor. A few months thereafter, and before the note was due, the brother made a general assignment for the benefit of creditors, and plaintiff's note was not paid in full. He then brought this action, claiming that he had made the loan on the faith of defendant's representations.

At the trial defendant among other points presented these: *Fourth.* To enable the plaintiff to recover, the jury must believe that John C. Duff represented his brother Agnew to be in good and solvent circumstances at the time the plaintiff applied to him; that the plaintiff, owing to his relations with the defendant, had a right to rely upon such representation; that such representation was false; that John C. Duff knew and believed, or had reason to know or believe, it to be false, and made such representation recklessly, without any just reason for making the same, and with the design and intent, fraudulently and dishonestly, to enable his brother to obtain

the plaintiff's money. *Answer:* It was not necessary that the defendant, if he made the statements and representations, actually knew them to be false. If he made them recklessly, without sufficient reason for knowing and believing them to be true, and with the intent to enable his brother Agnew thereby to obtain the plaintiff's money, and the representations afterward turned out to be false, and damage resulted, it would be sufficient to create the liability of the defendant, without it appearing that the defendant knew or had reason to know or believe them to be false.

Fifth. If the jury believe that John C. Duff from time to time sought information as to his brother's standing financially, and with an honest belief that he (Agnew) was solvent, and could pay his debts—so represented his circumstances to Williams—the plaintiff can not recover, even if such representations turned out afterward to be incorrect. *Answer:* This we affirm, if by "so represented his circumstances to Williams" we are to understand, giving or communicating information to plaintiff as information thus obtained merely; but the case would be different if he made the representations and statements as actual facts, as of his own knowledge.

The judgment below was for plaintiff, and defendant took a writ of error.

S. B. Wilson and Frank Wilson, for plaintiff in error.

John J. Wickham, for defendant in error.

STERRETT, J. In answer to the fourth point the learned judge said to the jury, that if the defendant made the alleged statements and representations, it was unnecessary to show that he "actually knew them to be false." If he made them recklessly, without sufficient reason for knowing and believing them to be true, or did he know that they were false? We are of opinion that the question was submitted to the jury in a manner that was calculated to lead them into an inquiry that was irrelevant and prejudicial to the defendant, and for this reason the first assignment of error should be sustained.

The defendant was entitled to an unqualified affirmance of

his fifth point, in which the court was requested to say: "If the jury believe that John C. Duff from time to time sought information as to his brother's standing financially, and with an honest belief that he was solvent and could pay his debts—so represented his condition to Williams—the plaintiff can not recover, even if such representations turned out afterward to be incorrect." This was putting the defense on its true ground—that of good faith. While the learned judge affirmed this proposition, he did so with a qualification which greatly weakened its force, by saying, "if by the words 'so represented his circumstances to Williams,' we are to understand giving or communicating information to the plaintiff as information thus obtained merely; but the case would be different if he made the representations as actual facts, as of his own knowledge." The jury would likely understand from this that the defendant was bound to inform the plaintiff that he had made inquiry as to his brother's standing, and give him in detail the information he had thus obtained, so that he might have the *data* from which to draw his own conclusions. Of course there could have been no objection to this mode of imparting information to the plaintiff, but it is not the only way in which it could be honestly done. He could with equally good faith state, as conclusions of fact, the inferences which he drew from the information he had obtained. If, as the result of inquiry, he came to the conclusion that his brother's financial standing was as good as his own, what would be the impropriety of honestly stating this to the plaintiff as a fact, instead of communicating to him the items of information upon which he had formed his judgment and belief? Taking into consideration all that was said and done, it must, after all, resolve itself into a question of sincerity and good faith. The principles involved are so clearly stated in *Bokee vs. Walker, supra*; *Boyd's Ex'res vs. Browne*, 6 Barr, 310; *Huber vs. Wilson*, 11 Harris, 178; *Rheem vs. The Naugatuck Wheel Co.*, 9 Casey, 358; *Graham vs. Hollinger*, 10 Wright, 55; and *Dilworth vs. Bradner et al.*, decided at the present term, 4 Weekly Notes, 505, that it is unnecessary to pursue the subject any further.

Judgment reversed and a *venire facias de novo* awarded.

Supreme Court of Michigan.

JUNE TERM, 1877.

EGGLESTON ET AL. VS. BOARDMAN.

1. ATTORNEY-AT-LAW—ACTION FOR SERVICES—VALUE OF SERVICES.—In determining the value of an attorney's services, his professional skill and standing, his experience, the nature of the controversy and its result, the amount involved, and the character of the questions raised, must all be taken into consideration. He is entitled to a reasonable compensation, to be determined under all the circumstances from the prices usually charged for similar services.
2. IBID—RETAINER—ACTION.—Retainers may be recovered on the common counts.
3. AGENCY—RATIFICATION BY SILENT ASSENT.—Where a client stands by and permits professional work to be done by an attorney under the direction of an attorney whom he employed, he assents thereto by his silence and acquiescence.

Assumpsit on the common counts to recover for the services of plaintiffs rendered as attorneys in several different causes.

Eggleson & Kleinhaus, for plaintiffs. The nature of the suit and what it involved was admissible. (7 Penn. St. 543; 21 Vt. 419; 3 La. An. 517; 14 Mo. 354.) Attorneys may employ assistance. (7 Allen, 419; 28 Ala. 601; 13 Tex. 532; 10 Vt. 68; 22 Ark. 170; 20 N. H. 205.)

Taggart & Wolcott cited 18 Vt.; 22 La. An. 85.

MARSTON, J. (*After stating the facts.*) Whenever an attorney or solicitor is retained in a cause, it becomes his implied duty to use and exercise reasonable skill, care, discretion, and judgment in the conduct and management thereof. It would be very difficult to lay down any definite rule or principle, applicable alike to all cases, as to the care and skill required. Each case must be governed by its own peculiar facts and circumstances, and the amount in controversy must in every case play a very important part in the determination of this question. The lapidary who cuts, polishes, and engraves a precious stone of exceedingly great value, must exercise much more care, skill, and judgment than would be required in the performance of like work upon one of but ordinary or little value, and he would be entitled

to demand and receive a correspondingly increased compensation in the former case above that in the latter, although the time spent by him in each case was the same. The common carrier charges much more for carrying jewels, gold, bank-bills, or valuable papers than for more bulky and less valuable things, although the latter may be vastly more heavy, cumbersome, and in fact much more expensive to transport. It is very evident that the responsibility, the care, and anxiety, and mental labor is much greater in a case where the amount in controversy is large than where it is insignificant, although perhaps the same questions might be raised in each case, or the more difficult questions arise in the case where the amount was of but slight consequence. Nor is this responsibility, care, and mental labor dependent alone upon the number of hours or days which may be given to the preparation and trial or argument of a case. This responsibility and mental anxiety is not so imaginative and shadowy that it should not be considered in arriving at a proper compensation to be allowed in fixing the value of the services rendered. Nor is the number of days which may be given to the preparation of a case alone, even if the exact time could be ascertained in any given case, a governing test. Twelve hours spent in the study of a novel will not usually be as exhausting as the same time devoted to the study of Coke upon Littleton would be, even although a great deal more ground might be gone over in the former than would in all probability be in the latter case. We can see no analogy between this kind or class of work and that performed by the ordinary laborer, nor can the creditable fact that attorneys generally, where the amount in controversy is small, or their client is poor, charge and receive much less than their services may in fact have been worth, prevent their recovering a reasonable compensation in proportion to the magnitude of the interests committed to their care. In fact, in all cases the professional skill and standing of the person employed, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case, as well

as the result, must all be taken into consideration in fixing the value of the services rendered. (*Vilas vs. Downer*, 21 Vt. 419; *Kentucky Bank vs. Combs*, 7 Penn. St. 543; *Stanton vs. Embrey*, 93 U. S. 548.)

The amount charged by an attorney in a certain case can not fairly be considered as evidence competent to fix the value of the services rendered by the attorney for the other parties in the same case. The amount paid in a particular case can not be considered or accepted as the proper amount in all like cases. It is not like the sale of certain commodities, where the price at which an article sold may have a tendency to fix or show the market price. There may be peculiar circumstances or elements which assisted in fixing the amount paid in one case, which would not exist in another, or even between counsel of equal standing in the same case, both in the character of the work and in the amount and kind of preparation required. The question is, what were plaintiff's services reasonably worth, taking into consideration the facts and circumstances already adverted to, and this must be determined from the prices *usually* charged for similar services.

It is claimed that plaintiffs can not charge and recover a retainer without a special contract, and that the right to receive the same must be declared upon specially. There is no force in this position. Retainers are uniformly and universally charged, and the same may be recovered under the common counts. If anything further or more definite is required, it is furnished by the bill of particulars.

From necessity a firm engaged in active practice and doing a large business must permit much of the work to be done by others, under their direction. A person or firm is very often retained for the purpose of securing their counsel and assistance, which usually is the most important part, and without any expectation that the services to be performed will extend beyond this. And where the client stands by and permits work to be done, or an argument to be made on his behalf by a person in the service of and under the direction of the attorneys he retained, we think it may very fairly be assumed from his silence and acquiescence that he con-

sented thereto. We think the charge of the court upon this part of the case was unobjectionable. Judgment affirmed, with costs.

English High Court of Justice,
Common Pleas Division.

FEBRUARY 1, 1878.

BRADBURN vs. FOLEY.

A custom that the outgoing tenant of a farm shall look exclusively to the incoming tenant, where there is one, and not to the landlord, for compensation for the seeds, acts of husbandry, tillages, etc., is so unreasonable, uncertain, and prejudicial to the interests of both landlords and tenants as to be bad in law.

Special case from County Court. The action was brought by the trustee in the bankruptcy of one Davies, who was a tenant of defendant, for seeds, sowing, harrowing, and other acts of husbandry and tillage on the leased farm. Before the crops had grown for the benefit of which these acts had been performed, the tenancy of Davies expired and another tenant came in. At the trial evidence was given on the part of the plaintiff that the custom of the country was for the landlord to pay the outgoing tenant for the seeds, acts of husbandry, tillage, etc., unless there was an agreement between the outgoing and incoming tenants that the incoming tenant should pay for the same.

For the defendant it was contended that he was not liable, and that by the custom of the country when there was an incoming tenant who entered on the farm at the expiration of the tenancy of the outgoing tenant, he and not the landlord became liable to pay the outgoing tenant for the seeds, acts of husbandry, tillages, etc., and that the landlord was only liable when there was no incoming tenant.

By way of reply, it was contended that no such custom as that set up by the defendant could in fact exist, and that such custom was unreasonable and bad.

The learned judge entered a verdict generally for the defendant upon the facts and evidence before him. He found that, by the custom of the country, the incoming tenant, and not the landlord, was liable to pay for the seeds, acts of husbandry, and tillages.

The questions for the opinion of the court are : 1. Whether such a custom as that set up by the defendant can in fact exist? 2. Whether, if such a custom can in fact exist, it is a good custom? 3. Whether, upon the facts stated, the landlord or the incoming tenant is liable to the plaintiff for the seeds, acts of husbandry, and tillages, etc.?

Jelf, for plaintiff.

J. D. Sim, for defendant.

LINDLEY, J. It appears to us that, if the custom found to exist in this case can be supported in point of law, there is nothing in the lease under which the plaintiff held inconsistent with the custom, so as to exclude its application to him when his tenancy determined. It is very true that when he went in he agreed to pay the outgoing tenant's valuation "in exoneration of the landlord;" but there is no provision in the lease to the effect that the landlord should compensate the plaintiff on his going out; and apart from custom no obligation so to do can be implied. The expression "in exoneration of the landlord" shows that the landlord was (or might be alleged to be) liable to compensate the plaintiff's immediate predecessor in the occupation of the farm; but whether such liability was by reason of some custom or some contract is not stated, and is not known to us; and even if it were by reason of some supposed custom, the existence of such custom is inconsistent with the custom found in fact to exist. The custom here found to exist in point of fact is to the effect that the incoming tenant, if there be one, is the only person liable to compensate the outgoing tenant; the custom as found exempts the landlord from liability altogether. Such a custom will be found on examination to involve the following consequences : 1. That the outgoing tenant has imposed upon him for his sole and exclusive debtor a person in whose selection he has no choice, and

with whom he has made no contract at all. 2. That the incoming tenant has to make compensation to the outgoing tenant irrespectively of the purposes for which he (the incoming tenant) may work the land ; and whatever the terms between him and the landlord may be, and whether the incoming tenant takes the land for a week, a month, a year, or a long term. 3. That the outgoing tenant can make no arrangement with his landlord as to his valuation, unless the incoming tenant is a party to it and assents to it. 4. That in the event of a letting and undertaking it is (on the custom as stated) uncertain who is to pay, viz. : the immediate lessee from the landlord or the ultimate tenant who takes possession. 5. That such a custom would lead any prudent tenant to run his farm out as much as by law he could, and to leave as little as possible for the incoming tenant to pay for. A custom having such consequences as these appear to us so unreasonable, uncertain, and prejudicial to the interests both of the landlords and tenants as to be incapable of being supported in point of law. The argument that it is to the interest of the landlord to secure a solvent tenant, and that consequently the outgoing tenant runs practically little or no risk, does not meet all the grounds of unreasonableness above pointed out. Indeed, it does not adequately meet any of them ; for it would be to the interest of an unscrupulous landlord to put in an insolvent man as tenant for a short time, so as to avoid having to pay the outgoing tenant himself, and yet to obtain possession before the poverty of the new tenant could be productive of injury. The reasonableness or unreasonableness of a custom is a question of law for the court (see *Tyson vs. Smith*, 9 A. & E. 421), and not a question of fact for the jury, and the principles applicable to such questions will be found in Com. Dig., Copyhold, S., and *Tyson vs. Smith*, *ubi sup.*, and on these principles we proceed. It may, indeed, be said that the custom here condemned is that which prevails in practice all over England, it being well known that as a matter of fact the outgoing and incoming tenants usually settle questions of valuation between themselves without referring to the landlord. This

is no doubt true; but if the practice is examined it will be found to be based entirely on the principle that the landlord is liable by custom to the outgoing tenant, and that the incoming tenant is not liable to the outgoing tenant where there is no contract, express or tacit, between them. See *Faviell vs. Gascoigne*, 7 Ex. 273; *Stafford vs. Gardner*, L Rep., 7 C. P. 242; *Codd vs. Brown*, 15 L. T. Rep. (N. S.) 536. The custom here found to exist is totally different; it exonerates the landlord from all liability and imposes a liability on the incoming tenant to the outgoing tenant, even in the absence of any contract, express or tacit, between them. There is no inconsistency, therefore, in condemning the custom and upholding the practice which is based upon a custom wholly opposed to that with which we have to deal. Holding as we do that the custom found to exist in point of fact can not be supported in point of law, we set aside the verdict of the County Court judge and direct a verdict to be entered for the plaintiff subject to a valuation; the defendant must pay the costs of the action and of this appeal.

Supreme Court Proceedings.

MONDAY, July 8, 1878.

The Supreme Court of the State of California was duly opened this day for the July term, 1878, thereof, according to law.

Present—Hons. Wm. T. Wallace, C. J.; J. B. Crockett, J.; A. Rhodes, J.; A. C. Niles, J.; E. W. McKinstry, J.; D. B. Woolf, Clerk.

The following proceedings were had:

6152, *Kingsbury vs. Kelley*; appeal dismissed.—6153, *Treadwell vs. Stiger et al.*; ordered that appellant have twenty days additional time in which to file the transcript on appeal herein.—5880, *Celis vs. Maclay et al.*; placed at the foot of the calendar of the present term for argument.—6139, *Watson vs. Rogers*; the motion to dissolve the appeal herein denied.—5881, *Parsons vs. Armstrong*; dismissed without costs.—*Reimer vs. Hardy*; motion that judgment herein be

reversed, continued until the case is called for argument on the regular calendar.—6112, Jansens vs. Hill et al.; appeal dismissed, counsel for the appellant not objecting.—6113, Gonzales vs. Hill et al.; same order as in 6112—Jansens vs. Hill.—6105, Gallardo vs. Barber et al.; motion to dismiss the appeal herein continued until Monday, July 15th.—5793, People *ex rel.* Hastings vs. Jackson and Devlin; continued for the term.—6130, Burke vs. Cushing; cause ordered on the calendar of the present term, and set for July 16th, in place of People *ex rel.* Hastings vs. Jackson and Devlin.—6052, Wilcoxson vs. Sprague et al.; continued for the term.—6062, Dupuy vs. Merrill; motion to dismiss the appeal submitted.—9143, Thomas vs. Lawlor; motion to dismiss the appeal continued until July 15th.

H. T. Hazard, admitted to practice, on motion of J. J. Williams, and proof of admission to practice in all the courts of Michigan.

S. C. Scheeline, admitted to practice, on motion of S. Rosenbaum, and a license from the Supreme Court of New York.

6045, *ex parte* William Smith, *certiorari*; further argument continued until after examination of the class.

A class of eleven applicants were called, and the court postponed their examination until afternoon.

3659 and 3660, Atherton vs. Fowler. Now comes C. G. Page, Esq., of counsel for appellants, and moves the court for judgment of restitution, etc., on filing the mandate from the Supreme Court of the United States herein. Motion continued until July 22d.

TUESDAY, July 9.

W. H. G. French, having passed a satisfactory examination in open court as to his qualifications and learning in the law, it is ordered that the said W. H. G. French be and is hereby admitted to practice as an attorney and counselor in all the courts of this State.

J. B. Eames, admitted to practice, on motion of E. J. Pringle, and license from Massachusetts.

James V. Coleman, admitted to practice, on motion of T. I. Bergin, and license from the District of Columbia.

F. Lee Cook, admitted to practice, on motion of Hon. W. J. Graves, and license from Tennessee.

Joseph P. Joachimsen, admitted to practice, on motion of H. H. Loewenthal, and license from New York.

6134, Davidson vs. Whalen; motion to dismiss the appeal denied, and cause ordered on calendar of present term for first vacant day.—6136, Sharp vs. Miller; on motion of respondent, ordered that additional record herein be filed, and, on motion of appellant, ordered that undertaking on appeal be filed herein, *nunc pro tunc*, as of April 6, 1878.—6074, Hancock vs. Rocha; motion to dismiss the appeal herein denied.—6068, Hancock vs. Lopes; motion to dismiss the appeal herein denied.—6045, *ex parte* Wm. Smith, *certiorari*; cause submitted.

10,304, People vs. Jones; argument concluded, and cause submitted.—10,349, People vs. Platt; cause continued with leave to set aside continuance and submit on briefs.—Ladd vs. Tully et al.; appellant have twenty days additional time in which to file the transcript on appeal herein.—10,325, submitted.—10,324, People vs. Bailey; argued and submitted.—10,346, People vs. Gibbs; stricken from the calendar.—10,347, People vs. Fong Ah Tuck; argued and submitted. 10,348, People vs. Bevans; judgment and orders affirmed.—10,352, People vs. Bell; argued and submitted.

WEDNESDAY, July 10, 1878.

Thomas McNulta, admitted to practice, on motion of S. Rosenbaum; license from the Supreme Court of Illinois.

10,359, People *ex rel.* Peter Smith vs. P. W. Keyser; Judge of the Tenth District Court ordered that an alternative writ of mandate issue as prayed for, returnable before this court on the 18th day of July, 1878.—5411, Felton vs. Robinson; continued till October term at Los Angeles.—10,353, People vs. Felix; judgment reversed by consent of the Attorney-General.—6160, Brady vs. Feisel; ordered that appellant have twenty days from date in which to file the transcript on appeal herein.—10,356, People vs. Collins; argued and cause submitted, with twenty days to each.—6062, Dupuy vs. Merrill; motion to dismiss the appeal herein denied.

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JULY 20, 1878.

No. 21.

Current Topics.

THERE are about twenty-five cases only that have been submitted that remain undecided by the Supreme Court.

This is conclusive that the judges composing the present court have been performing great labor, and have not neglected any of their duties to the people.

Notwithstanding this, however, there remains a long calendar of cases waiting to be argued, and just here is where the present system is at fault. No more than from three to five cases can be argued before the court each day, and from this it will be seen that a large portion of the present term calendar will not be reached at this term. The trouble does not grow out of a neglect of duty, but from an absolute need of more courts and more judges.

A DRAFT of a constitution by E. D. Sawyer, Esq., of the San Francisco Bar, addressed to the members of the Constitutional Convention, has been received by us. It is a draft of a complete constitution, embracing all the branches of a republican government. Mr. Sawyer says: "I have examined all the constitutions of the several States, and drafted from the later ones many reformatory measures." We notice among the principal changes proposed a section making contracts void for the payment of more than one per cent. per month interest on money. Such a provision can never be classed among those of reform. Money, like any other property, should always be worth what it will bring. If Congress could pass a law on this subject fixing the same rate of interest for all the States, a low rate of interest would be a wise

and reformatory provision; but to establish a lower rate in one State than another tends to drive all the surplus capital to those localities where the highest rates can be obtained.

We find, however, a large majority of those sections of proposed changes, such as should be embodied in all constitutions whose aim is to protect life and property and to establish society on the basis of virtue and honesty.

The plan for a judiciary has been taken from that of Hon. Sol. Heydenfeldt, which we have heretofore noticed.

If a person intentionally inflicts upon another a dangerous wound—one that is calculated to endanger and destroy life—and death ensues therefrom within a year and a day, it is sufficient proof of the offense either of manslaughter or murder, as the case may be; and he is none the less responsible for the result, although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskilled or improper treatment aggravated the wound and contributed to his death. This doctrine was announced after an examination of the old authorities by the Supreme Court of Errors of Connecticut, in *State vs. Bantley* (17 Am. Law Reg. 447). (See Roscoe Crim. Ev., 7th ed., 717; 1 Hale P. C. 428; 3 Greenleaf on Evidence, § 139; *Rex vs. Rews Kelynge*, 26.) In *Regina vs. Holland* (2 Mood. & Rob. 351), the deceased had been severely cut with an iron instrument across one of his fingers, and had refused to have it amputated, and at the end of a fortnight lock-jaw came on, and the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon expressed the opinion that early amputation would probably have saved his life. MAULE, J., held that a party inflicting a wound which ultimately becomes the cause of death, is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. In *Com. vs. Pike* (3 Cush. 181), it was held that where a surgical operation is performed in a proper manner, and under circumstances which render it necessary, in the opinion of competent surgeons, upon one who has received a wound ap-

parently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of the death, the party inflicting the wound will nevertheless be responsible for the consequences. In *Rex vs. Johnson* (1 Lewin C. C.), the deceased died from a blow received in a fight with the prisoner; a surgeon expressed an opinion that a blow on the stomach, in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober. HULLOCK, B., directed an acquittal, observing that when the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible to apportion the operation of the several causes and to say with certainty that the death was immediately occasioned by any one of them in particular. Of this case Roscoe remarks that it may be doubted how far this ruling of the learned judge was correct. (Roscoe's Crim. Ev. 7th ed. 718.) In *Rex vs. Martin* (5 Car. & P. 130), where the deceased at the time when the blow was given was in an infirm state of health, PARK, J., said to the jury: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it." In *Commonwealth vs. Hackett* (2 Allen, 136), it was held that one who has willfully inflicted upon another a dangerous wound with a deadly weapon, from which death ensued, is guilty of murder or manslaughter, as the evidence may prove, although through want of due care or skill the improper treatment of the wound by surgeons may have contributed to the death.

Supreme Court of California.

JULY TERM.

[No. 5,423.]

[Filed July 16, 1878.]

MONTEREY AND SALINAS V. R. R. CO., APPELLANT,
VS.
THOS. HILDRETH, RESPONDENT.

CORPORATIONS—POWERS LIMITED BY THE ARTICLES.—The instrument from which the corporation derives its being must be held to limit the power of the corporation so that it can bind as stockholders, as of the date of its filing, only those named in the articles, and to the amounts therein mentioned.

IDEM—CASE.—Defendant signed a preliminary agreement for \$25,000 (250 shares) of the capital stock of the railroad (plaintiff), but signed the articles of incorporation for (40 shares) \$4,000 only. *Held:* in an action to recover \$25,000, and that the defendant be adjudged a subscriber for 250 shares of said stock, and subject to all liabilities in consequence of said subscription, that the action could not be maintained.

Appeal from the Twentieth District Court, Santa Clara County.

The complaint alleges, in substance, that on February 26, 1874, the defendant, for and in consideration of the said railroad to be constructed as aforesaid, and for other good and valuable considerations, signed, executed, and delivered to the plaintiff an instrument in writing, and of that date, in these words and figures: "Whereas, it is proposed to construct a railroad from a point at or near the city of Monterey, county of Monterey, and State of California, to a point at or near Salinas City, in the Salinas Valley, we, the undersigned, for the purpose of incorporating a company to construct and operate such railroad, in consideration of the premises and other good and valuable considerations, do mutually promise and agree to and with each other that we will invest in the capital stock of a company to be incorporated by us for the purpose above mentioned the several amounts of

money set opposite our respective names, in gold coin of the United States."

"SALINAS CITY, CALIFORNIA, February 26, 1874.

David Jocks.....\$25,000
Thos. Hildreth..... 25,000
etc."

That the corporation was afterward formed (February 27, 1874) on the faith of such agreement, and that the defendant by various acts ratified the same.

That the defendant has failed and refused to pay any of the several assessments that have been made, and waiving all proceedings under chapter 2, bill 1, part 4, of the Civil Code of California, elects to recover the amount of each of said assessments by action against the defendant, and prays that the said defendant may be decreed and adjudged to pay to the plaintiff the sum of \$25,000, and be adjudged to be the subscriber for 250 shares of the said railroad company, and be subject to all the liabilities in consequence of and upon said subscription.

The findings of the court below, which are admitted, show that the defendant signed the articles of incorporation which were filed subsequent to the preliminary subscription for only \$4,000. It is contended by the plaintiff that the defendant is liable for the assessments upon shares of stock corresponding in value to the amount stated in the preliminary paper or agreement dated February 26, 1874.

The court below gave judgment for the defendant for costs.

D. M. Delmas, for respondent.

A person can become a member of a statutory corporation only by pursuing some one of the methods designated by the statute. (28 Mich. 147; 18 Barb. 301.) The Code of this State expressly declares who are the corporators, members, and stockholders of corporations created under its provisions. They are those signing the articles of incorporation which are filed, their associates, and the assigns of such signers and their associates. (C. C. 296.)

The signing of a preliminary agreement like the one here sued on does not bring a party under any of the foregoing categories.

The defendant is liable only for the 40 shares, valued at \$4,000, stated in the articles of incorporation.

Wm. Mathew, for appellant, cited *Christian College vs. Hendley* (49 Cal. 347); *Chater vs. S. F. Sugar Ref. Co.* (19 Cal. 219); *Athal Music Hall Company vs. Cary* (116 Mass. 474); *Buffalo and N. Y. City R. R. Co. vs. Dudley* (14 N. Y. 336); *Lake Ontario and C. R. Co. vs. Mason* (16 N. Y. 458); 14 Wend. 20; 37 N. Y. 626; 2 Bibb. 576; 17 Ill. 57; 72 Penn. St. R. 46; 28 Mich. 130; 16 Ind. 390; 36 Conn. 412.

McKINSTY, J.

The rights of the parties to this action must be determined by reference to certain provisions of the Civil Code, as the same read when the corporation (plaintiff) was formed.

Section 293 of that Code provided: "Each intended corporation named in Section 291, before filing *articles of incorporation*, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amounts, to-wit:

"1. One thousand dollars for each mile of railroads."

Section 290 of the same Code requires that the "articles of incorporation" shall set forth, among other matter, "If there is a capital stock, *the amount actually subscribed, and by whom.*"

The Code prescribes no particular form for the subscription paper, from which it may appear that one thousand dollars a mile was subscribed toward the "intended" railroad.

But it is plain that the amounts subscribed, and by whom, must be fully set forth in the articles of incorporation. Those who sign and file the articles, and thus bring the corporation into existence, act for the real subscribers. If the statement contained in the articles as to the amount subscribed, and by whom, is incorrect, one of two results must follow: either the attempt to give existence to the corporation is abortive, or the corporation which comes into life is estopped from claiming that any other person than those named as subscribers became a member when the articles were filed, or that any person therein named was a subscriber for

a larger sum than that mentioned in the articles. In either event this action can not be maintained.

Whether one not named as subscriber in the articles of incorporation, but who had in fact previously subscribed, could have the articles declared null, or on the other hand, claim the right to be admitted as an associate member, is not an immediate question. The requirement of the Code is absolute and peremptory. The articles must set forth the amount subscribed and by whom. The instrument from which the corporation derives its being must be held to limit the power of the corporation, so that it can bind as stockholders as of the date of its filing only those named in the articles, and to the amounts therein mentioned.

Judgment affirmed.

We concur:

CROCKETT, J.

RHODES, J.

WALLACE, C. J.

[No. 5,191.]

[Filed July 16, 1878.]

KELLER, RESPONDENT, VS. LEWIS, APPELLANT.

CONTRACTS—FORFEITURES AND PENALTIES—WILL NOT BE ENFORCED IN EQUITY.—

It is a universal rule in equity never to enforce either a penalty or a forfeiture, so where there existed a contract between parties for the sale of land containing a forfeiture or penalty for failure to pay the balance of the purchase money, in the view of a court of equity the legal title is retained by the vendor as security for the balance. He may bring ejectment, if out of possession, but if he come into *equity* for relief his better remedy is to proceed to foreclose the vendor's right to purchase, and the court must fix a day within which he must pay the balance. He can not proceed to enforce the forfeiture or penalty.

Appeal from the Seventeenth District Court, Los Angeles County.

The plaintiff and defendant entered into an agreement for the sale and purchase of certain lands belonging to the plaintiff, the defendant agreeing to pay one-third of the value in cash and the balance on or before the 20th day of June, 1872. It was further stipulated that in the event of a failure

to comply with the terms thereof by the defendant herein the plaintiff should be released from all obligations in law or equity to convey said property, and that the defendant shall forfeit all right thereto. The plaintiff was to make perfect title.

The defendant paid eleven thousand six hundred and sixty-six dollars, being the amount of the cash payment, but refused to pay the balance, because the plaintiff's title was not perfect and undisputed.

The plaintiff in his complaint prays that the contract be declared forfeited and null and of no effect, and that defendant have no claim against him by reason of any transaction in relation to said agreement, and that defendant be forever barred from asserting any claim whatever to said land or to said money already paid, and for such other relief, etc.

The court below granted the prayer of the plaintiff, from which judgment the defendant appealed.

Glassell, Chapman & Smiths, and Williams and Thornton, of counsel for appellants.

Brunson, Eastman & Graves, for respondent.

McKINSTRY, J.

The decree declares the money already paid on the contract—and all right of defendants in and to the lands—forfeited.

It is a *universal rule* in equity never to enforce either a penalty or forfeiture (2 Story's Eq. 1319, and cases cited). On the contrary, equity frequently interposes to prevent the enforcement of a forfeiture at law. In the view of a court of equity, in cases like the present, the legal title is retained by the vendor as security for the balance of the purchase money, and if the vendor obtains his money and interest he gets all he expected when he entered into the contract. True, he is not bound to wait indefinitely after the failure of the purchaser to comply with the terms of his agreement. If the payments are not made when due, he may, if out of possession, bring his ejectment and recover the possession; but if he comes into *equity* for relief, his better remedy, in case of

persistent default on the part of the vendee, is to institute proceedings to foreclose the right of the vendee to purchase —the decree usually giving the latter a definite time within which to perform. (*Hansborough vs. Peck*, 5 Wallace, 506.)

Under the circumstances of this case, as presented by the pleadings and evidence, the decree of the District Court should have fixed a day within which the defendants should pay the balance due upon the contract, and costs, etc., or be forever foreclosed of all right or interest in the lands or to a conveyance thereof.

Judgment and order reversed, and cause remanded with directions to the court below to render a decree in accordance with the views herein expressed.

We concur:

CROCKETT, J.

RHODES, J.

WALLACE, C. J.

Supreme Court of the United States.

MAY 13, 1878.

IN RE JACKSON.

1. **CONSTITUTIONAL LAW—POSTAL SYSTEM—AUTHORITY OF CONGRESS TO DESIGNATE MATTER TO BE CARRIED AND MATTER TO BE EXCLUDED.**—The power vested in Congress to establish “post-offices and post-roads” embraces the regulation of the entire postal system of the country. Under it Congress may designate what shall be carried in the mail, and what shall be excluded.
2. **IBID.—INSPECTION—LETTERS—PRINTED MATTER.**—In the enforcement of regulations excluding matter from the mail a distinction is to be made between different kinds of mail-matter; between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.
3. **CONSTITUTIONAL LAW—OPENING AND EXAMINING LETTERS—WARRANT.**—Letters and sealed packages subject to letter postage in the mail can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. The constitutional guarantee

of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.

4. **Ibid.—FREEDOM OF THE PRESS—CIRCULATION—OTHER TRANSPORTATION.—**

Regulations against the transportation in the mail of printed matter, which is open to examination, can not be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. When, therefore, printed matter is excluded from the mail, its transportation in any other way can not be forbidden by Congress.

5. **EXCLUDING MAIL-MATTER—EVIDENCE OF VIOLATION OF REGULATIONS—INSPECTION—OTHER EVIDENCE.—**Regulations excluding matter from the mail may be enforced through the courts, upon competent evidence of their violation obtained in other ways than by the unlawful inspection of letters and sealed packages; and with respect to objectionable printed matter, open to examination, they may in some cases also be enforced by the direct action of the officers of the postal service upon their own inspection, as where the object is exposed and shows unmistakably that it is prohibited, as in the case of an obscene picture or print.

6. **CRIMINAL LAW—CONVICTION—IMPRISONMENT UNTIL FINE PAID—VALIDITY.—**

When a party is convicted of an offense and sentenced to pay a fine, it is within the discretion of the court to order his imprisonment until the fine is paid.

On petition for writs of *habeas corpus* and *certiorari*.

Section 3894 of the Revised Statutes provides that "no letter or circular concerning (illegal) lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail;" and that "any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution." By an act passed in July, 1876, the word "illegal" was stricken out of the section. Under the law as thus amended the petitioner was indicted, in the Circuit Court of the United States for the Southern District of New York, for knowingly and unlawfully depositing, on the 23d of February, 1877, at that district, in the mail of the United States, to be conveyed in it, a circular concerning a lottery offering prizes, inclosed in an envelope addressed to one J. Ketcham, at Gloversville, New York. The indictment sets forth the offense in separate counts so as to cover every form in which it could be stated under the act. Upon being arraigned the petitioner stood

mute, refusing to plead, and thereupon a plea of not guilty was entered in his behalf by order of the court. (Rev. St. § 1032.) He was subsequently tried, convicted, and sentenced to pay a fine of one hundred dollars, with the costs of the prosecution, and to be committed to the county jail until the fine and costs were paid. Upon his commitment, which followed, he presented to this court a petition alleging that he was imprisoned and restrained of his liberty by the marshal of the Southern District of New York, under the conviction ; that such conviction was illegal, and that the illegality consisted in this : that the court had no jurisdiction to punish him for the acts charged in the indictment ; that the act under which the indictment was drawn was unconstitutional and void ; and that the court exceeded its jurisdiction in committing him until the fine was paid. He therefore prayed for a writ of *habeas corpus* to be directed to the marshal to bring him before the court, and a writ of *certiorari* to be directed to the clerk of the Circuit Court to send up the record of his conviction, that this court might inquire into the cause and legality of his imprisonment. Accompanying the petition as exhibits were copies of the indictment and of the record of conviction. The court, instead of ordering that the writs issue at once, entered a rule, the counsel of the petitioners consenting thereto, that cause be shown, on a day designated, why the writs should not issue as prayed, and that a copy of the rule be served on the Attorney-General of the United States, the marshal of the Southern District of New York, and the clerk of the Circuit Court. The Attorney-General, for himself and others, answered the rule by averring that the petition and exhibits do not make out a case in which this court has jurisdiction to order the writs to issue, and that the petitioner is in lawful custody by virtue of the proceedings and sentence mentioned in the exhibits, and the commitment issued thereon.

A. J. Dittenhoefer and Louis F. Post, for petitioner.
Edwin B. Smith, Assistant Attorney-General, *contra*.

FIELD, J. The power vested in Congress "to establish post-

offices and post-roads" has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. The validity of legislation prescribing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned. What should be mailable has varied at different times, changing with the facility of transportation over the post-roads. At one time only letters, newspapers, magazines, pamphlets, and other printed matter, not exceeding eight ounces in weight, were carried; afterward books were added to the list, and now small packages of merchandise, not exceeding a prescribed weight, as well as books and printed matter of all kinds, are transported in the mail. The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail-matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement a distinction is to be made between different kinds of mail-matter; between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures ex-

tends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail-matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

Nor can any regulation be enforced against the transportation of printed matter in the mail which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way can not be forbidden by Congress.

In 1836, the question as to the power of Congress to exclude publications from the mail was discussed in the senate, and the prevailing opinion of its members, as expressed in debate, was against the existence of the power. President Jackson, in his annual message of the previous year, had referred to the attempted circulation through the mails of inflammatory appeals, addressed to the passions of the slaves, in prints and in various publications, tending to stimulate them to insurrection, and suggested to Congress the propriety of passing a law prohibiting, under severe penalties, such circulation of "incendiary publications" in the Southern States. In the senate that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman; and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the States; for if Congress might determine

what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation. Whilst, therefore, condemning in the strongest terms the circulation of the publications, he insisted that Congress had not the power to pass a law prohibiting their transmission through the mail, on the ground that it would abridge the liberty of the press. "To understand," he said, "more fully the extent of the control which the right of prohibiting circulation through the mail would give to the government over the press, it must be borne in mind that the power of Congress over the post-office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post-road; and that, by the Act of 1825, it is provided 'that no stage, or other vehicle which regularly performs trips on a post-road, or on a road parallel to it, shall carry letters.' The same provision extends to packets, boats, or other vessels on navigable waters. Like provision may be extended to newspapers and pamphlets, which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties." Mr. Calhoun at the same time contended that when a State had pronounced certain publications to be dangerous to its peace, and prohibited their circulation, it was the duty of Congress to respect its laws and co-operate in their enforcement; and whilst, therefore, Congress could not prohibit the transmission of the incendiary documents through the mails, it could prevent their delivery by the postmasters in the States where their circulation was forbidden. In the discussion upon the bill reported by him, similar views against the power of Congress were expressed by other senators, who did not concur in the opinion that the delivery of papers could be prevented when their transmission was permitted.

Great reliance is placed by the petitioner upon these views, coming as they did, in many instances, from men alike distinguished as jurists and statesmen. But it is evident that they were founded upon the assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail; and of course it would follow that if, with such a prohibition, the transportation in the mail could also be forbidden, the circulation of the documents would be destroyed and a fatal blow given to the freedom of the press. But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail-matter, in the sense in which those terms were used when the Constitution was adopted—consisting of letters, and of newspapers and pamphlets when not sent as merchandise; but further than this its power of prohibition can not extend.

Whilst regulations excluding matter from the mail can not be enforced in a way which would require or permit an examination into letters or sealed packages subject to letter postage, without warrant issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways, as from the parties receiving the letters or packages, or from agents depositing them in the post-office, or others cognizant of the facts. And as to objectionable printed matter, which is open to examination, the regulations may be enforced in a similar way, by the imposition of penalties for their violation through the courts; and in some cases, by the direct action of the officers of the postal service. In many instances those officers can act upon their own inspection, and from the nature of the case must act without other proof, as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed and shows unmistakably that it is prohibited, as in

the case of an obscene picture or print. In such cases no difficulty arises, and no principle is violated in excluding the prohibited articles or refusing to forward them. The evidence respecting them is seen by every one and is in its nature conclusive.

In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus, by the Act of March 3, 1873, Congress declared "that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisonment at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge."

All that Congress meant by this act was that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries, institutions which are supposed to have a demoralizing influence upon the people. There is no question before us as to the evi-

dence upon which the conviction of the petitioner was had; nor does it appear whether the envelope in which the prohibited circular was deposited in the mail was sealed or left open for examination. The only question for our determination relates to the constitutionality of the act, and of that we have no doubt.

The commitment of the petitioner to the county jail until his fine is paid was within the discretion of the court under the statute.

As there is an exemplified copy of the record of the petitioner's indictment and conviction accompanying the petition, the merits of his case have been considered at his request upon this application, and as we are of opinion that his imprisonment is legal no object would be subserved by issuing the writs; they are therefore *denied*.

United States Circuit Court, District of Oregon.

MARCH 25, 1878.

SEMPLE vs. BANK OF BRITISH COLUMBIA.

1. FOREIGN CORPORATION—VALIDITY OF TRANSACTIONS—COMPLIANCE WITH STATUTE.—A foreign corporation, until it has complied with the laws of the State prescribing the conditions upon which it may lawfully transact business within the State, is a mere nullity, a nonentity, and its transactions within the State are wholly void.
2. ESTOPPEL IN PAIS—SHOWING INVALIDITY OF CONTRACTS OF FOREIGN CORPORATION.—The doctrine of estoppel *in pais* does not prevent a party to a transaction with a corporation from showing that the corporation had not power to do a particular thing, or that it was done in violation of a statute.
3. TITLE—JUDICIAL OR VOLUNTARY SALE OF REAL PROPERTY—CONVEYANCE.—A sale of real property, whether judicial or voluntary, does not pass the title, but only gives a right to a conveyance of the property according to the terms of sale.

Action to recover the possession of certain lands in Portland. The plaintiff, in June, 1873, being a married woman and the owner in fee, as her separate property, of the premises in question, joining with her husband, mortgaged the property to the defendant, a foreign corporation doing busi-

ness in Oregon, to secure her husband's note for \$9,500. The premises were subsequently decreed to be sold as upon execution to pay the note, and upon sale were purchased for the bank, to which a conveyance was in due form executed by the sheriff. The plaintiff alleges that the bank, during the time of these transactions, was a foreign corporation, and had not complied with the laws of Oregon (Laws, 1874, p. 617) requiring such corporation to appoint a resident of the State its attorney to accept service of all process in actions against it, and therefore could not lawfully transact any business within the State, and thence that the note and mortgage were illegal and void.

W. L. Hill, H. Y. Thompson, G. H. Durham, and H. T. Bingham, for plaintiff.

W. A. Effinger, for defendant.

DEADY, Cir. J. (*After stating the facts.*) The defendant, as to this State, or any transaction therein, is neither a corporation *de jure* nor *de facto*. It has never acquired the right to exist here, or even attempted it. Whatever it may be in the place of its creation, here, at least, it is a mere nullity—a nonentity. The question of mere irregularities in its organization does not arise. For there is not the slightest ground for claiming that it has ever, regularly, or otherwise, become clothed with the form or power of a corporation in this State, or attempted to do so. Indeed, it was expressly prohibited from existing or exercising its corporate functions in Oregon, except upon the condition precedent that it shall first comply with the law of the State in the appointment of a resident agent. As well say that any fortuitous assemblage or association of persons not having in any way attempted or intended to become a corporation under the laws of this State might, nevertheless, by simply calling themselves such, and acting as such, become one *de facto*. As was said in *In re Comstock* (3 Saw. 218): “The doctrine of estoppel *in pais* has never been carried so far as to prevent a party from showing that a corporation, even if it be one *de jure*, had not the power to do a particular thing, or that it was done in violation of a statute.” No one is estopped to

show that an act upon which a party claims a right is illegal simply because he was a party to it—even *in pari delicto*. If the matter concerned the parties to the transaction alone, the rule might be otherwise; but the interest of society, in whose behalf the act is prohibited, is paramount to private equities. As was said in *Steadman vs. Duhamel* (1 C. B. 888), “There can not be an estoppel to show a violation of a statute, even to the prejudice of an innocent party;” and in *Keen vs. Coleman* (39 Penn. St. 299), “Legal incapacity can not be removed by fraudulent representation, nor can there be an estoppel involved in the act to which the incapacity relates that can take away that incapacity.”

It is assumed by the defendant that the mere sale by the sheriff, upon the decree of the court below, divested the plaintiff of her title to the premises. But upon a careful examination of the matter I am satisfied, both upon reason and authority, that the law is otherwise. In *Freeman on Ex.*, § 324, it is said that “in order to divest the legal title held by the defendant in execution, a conveyance must, in most of the States, be made by the proper officer, in pursuance of a prior levy and sale.” The purchaser, “though he is entitled on demand to receive a conveyance, can not be treated as the owner of the property till it has vested in him by a deed executed by the proper authority.” (See also *Ib.* § 333.) To the same effect is *Rorer on Jud. Sales*, § 357; *Bouvier, verba Sale*, 19. By the *Or. Civ. Code*, §§ 296, 301, 304, it is provided that a sale of real property upon execution is subject to redemption within sixty days after the confirmation of sale. But if redemption is not made within the time prescribed, the purchaser is entitled to a conveyance, and also the possession of the premises in the meantime. A *sale* of real property, whether judicial or voluntary, does not pass title, but only gives a right to a conveyance of the same according to the terms thereof. A *sale* by the sheriff is within the Statute of Frauds, and no title passes except upon the execution of a deed by him. (4 *Kent*, 434.) In some of the New England States no conveyance is necessary upon a forced sale, as the sheriff’s return, in analogy to his return upon an *elegit* in England, constitutes the title of the pur-

chaser. But wherever, as in this State, a conveyance is required, or rather wherever it is not expressly otherwise provided, no title vests in the purchaser at a judicial sale until the officer making the same executes a conveyance to him. In *Schemmerhorn vs. Merrill* (1 Barb. 511); *Smith vs. Colvin* (17 Barb. 157); *McMillan vs. Richards* (9 Cal. 365); *People vs. Mayhew* (26 Cal. 656); *Page vs. Rogers* (31 Cal. 294), it was held, under statutes substantially the same as that of Oregon, that a sale by a sheriff did not vest the title to the premises in the purchaser, but the execution and delivery of his deed therefor. This being so, the title to the premises at the date of the execution of the sheriff's deed to the defendant was, notwithstanding the sale, in the plaintiff, and the defendant being then forbidden to transact any business in this State, and therefore incapable of accepting said conveyance or receiving any right under it, the same, so far as it is concerned, was and is void and of no effect, and the title remains and is in the plaintiff. Neither did the confirmation of this supposed sale operate to validate the contract, or to enable it to contract, or to enable it to take anything under it. True, the Code declares that "the order of confirmation is a conclusive determination of the *regularity of proceeding* concerning such sale." (Or. Civ. Code, § 293.) But certainly a determination that the proceedings of the sheriff in conducting the sale in obedience to the process are regular does not include the question of the bidder's capacity to purchase and receive the title. The purchaser may be an infant, a married woman, or an alien enemy; but if he pays the price bid, and the proceedings by the sheriff are according to law, the sale will be confirmed. The question of the capacity of the purchaser to contract or receive the title is not before the court upon motion to confirm a sale, at least unless specially made, which is not claimed to have been done here. This is a matter which could concern no party to the proceeding but himself, and therefore in this respect he buys at his peril. Nor did the decree of sale give the defendant any right in or to the premises, but only the right to have the same sold according to law to satisfy its demand. (*McMillan vs. Richards, supra.*) Judgment for plaintiff.

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Current Topics.

THE leading article in the *American Law Review* for July, entitled, "Can States be compelled to pay their Debts?" will be read with great interest in view of the fact of an existing indebtedness on the part of the States of the union amounting to more than \$300,000,000; and that a theory generally obtains, that owing to the sovereignty of the States they can not be compelled to pay this indebtedness.

The writer claims that the decisions establish: (1) That a State is not sovereign in regard to the debts she contracts. (2) That she may be sued on such contracts in the Supreme Court of the United States. (3) That the Supreme Court will devise and prescribe the process by which its jurisdiction shall be made effectual. (4) That this jurisdiction will be applied at the suit of a citizen of another State. He argues that when a State in the union enters into a contract she lays down her sovereignty to that extent, and is subject to the constitutional inhibition as to that contract, and can pass no laws to impair the obligation thereof. When she makes a contract her obligation is exactly that of any other contracting party. And the writer submits that inasmuch as her contract is like that of an individual, and inasmuch as there exists a court that is competent to enforce it, and power to mould proceedings to that end, States may be made to pay their debts.

THE decision in the case of *Parry vs. Kelly*, rendered at the July term, 1877, of our Supreme Court (S. F. LAW JOURNAL, vol. 1, p. 14), created some surprise on the part of many of the profession.

The doctrine there announced was quite new and seemingly in violation of § 167 of the Civil Code. The suit was for a foreclosure of a mortgage executed by a married woman on community property during the life of her husband. It was held that the mortgage was not void and attached to whatever title came to the wife after the death of the husband.

In this number the decision is reviewed by "Criticus" with much good reasoning, opposing the views expressed by the court. The article is worthy a close and attentive reading by the bar.

THE Secretary of the Interior, in the matter of an application by Dudymott, has decided that Pacific Railroad lands not sold within three years after the completion of the road are subject to pre-emption.

The decision says nearly all of the grants made by the United States to aid in the construction of railroads, or other works of internal improvements, have had annexed to them conditions, some of which are conditions precedent, and others conditions subsequent. Such conditions are found in this grant to the Kansas Pacific. It can not be denied that Congress had a right to make the grant to said company absolute or conditional, but in order to secure the objects for which the grant was made conditions were annexed. The company had the right to accept or reject the grant with the conditions therein made; but, having accepted it, it is therein estopped to deny their force and effect. One of these conditions, and the one under which the applicant now claims the right to enter a portion of land now granted to the company, is that "all such lands so granted by the section, which shall not be sold or disposed of by said company three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding \$1 25 per acre, to be paid to such company." While it is true that neither of the decisions of the Supreme Court clearly and distinctly define the right of Government in the disposal of said lands, still they clearly indicate the opinion of the court that such a right ex-

ists; and whether it be considered that estate granted is a conditioned estate, or an estate with a conditional limitation, in either case I am of opinion that it must be held that the condition runs with the grant, and is in effect a reservation of lands granted to the company which remained unsold by it at the expiration of the three years after the entire road was completed under the provisions of the pre-emption law. It is manifest, I think, that Congress did not intend to grant to said company such a large quantity of land to be held and sold by it at speculation prices; but, desiring to give it aid and assistance in its undertaking, at the same time provided that the actual settler, who was willing to pay the price stipulated, should have a right to settle and make a home upon any of the lands so granted. And in order to secure this right to the settler, and at the same time secure to the company an adequate consideration for the lands, reserved the right of sale thereof after the road had been completed for three years. This view is not inconsistent with the object to be attained in making the grant. That object was to aid a corporation in the construction of a work of national importance, which contemplated an expenditure of money beyond the resources of private individuals; and whether that aid should be given in lands, which might be sold by the company to reimburse it for expenditures made, or whether the Government should sell the land at a stipulated price and pay the proceeds arising therefrom to said company, were considered immaterial, both by the Government and the company that accepted the grant with this condition. The fact that said company so understood this grant is made evident by a circular issued by its Land Commissioners, dated May 12, 1873, inviting the purchase of its lands. More than four years have elapsed since the completion of the road, and its acceptance by the President, and the time Mr. Dudymott filed his declaratory statement for the tract in question. I am of opinion that his application should have been received by the local officers, subject, however, to the condition that it be made to appear, before final certificate issue to him, that at the time his declaratory statement was filed for said

tract, said company had not sold or disposed of the same. If the views I have expressed in relation to the sale and disposal of said lands are correct, and I see no reason to doubt their correctness, the sale and disposal of lands in the condition of these applied for, if unsold at that time by such company, is clearly within the jurisdiction of the Land Office, like other lands. By the terms of the grant by which said lands, or the proceeds which may arise from the sale thereof, inured to said company, it is provided that the lands remaining unsold at the expiration of three years from the time when the entire road was completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding \$1 25 per acre. In other words, that said lands shall revert to the public domain, for sale and disposal for said company, under the pre-emption laws of the United States, and whether it be considered that said lands are public lands in a general or special sense, can not, in my opinion, affect the jurisdiction of the Land Office in making sale and disposal. The decision concludes: "In making returns of money arising from sale of said lands, local officers should be instructed to keep separate account of lands sold and moneys received therefor on account, in order that the same may be passed to its credit." In this case, inasmuch as it does not satisfactorily appear whether the lands applied for had been sold by the company at the time Mr. Dudymott filed his declaratory statement, the Commissioner of the Land Office will instruct local officers to call upon said company for a statement within thirty days after service of said notice, that they order a hearing to determine the fact.

CAN A MARRIED WOMAN MORTGAGE COMMUNITY PROPERTY?

What is decided in Parry vs. Kelly, and is the decision sound?

The complaint is for the foreclosure of a mortgage on real property executed by defendant, Seraph A. Kelly (a married woman), September 3, 1874. The answer admits the execution of the mortgage on or about the 3d of September, 1874. The findings are that on or about the 1st of September, 1873, the plaintiff delivered to defendants, Cephas Kelly and Seraph A. Kelly, \$2,000, and that a day or two after that transaction, defendant, Seraph A. Kelly, executed a mortgage in her own name of the premises described in the complaint and delivered the same to the plaintiff. Finds the facts showing that the property mortgaged was community property. That Cephas Kelly (the husband) died April 30th, 1875. The conclusions of law are that the property mortgaged was community property, and that the mortgage executed by the wife alone on said community property is void. There was no motion for new trial, and the appeal was from the judgment alone. In the briefs and motion for rehearing the counsel on each side appear to have assumed that the mortgage was executed in September, 1874, and they argued accordingly. Whatever the actual findings were, the printed transcript on which the court must have acted, shows the findings to be that the mortgage was executed in September, 1873, which is in advancement of the amendment of Section 167 of the Civil Code. Strictly, the court should have based its opinion on the facts as they appear in the *findings*, unless at least the parties to the action admitted an error therein in such a formal manner that the court would act thereon; but such does not appear from the records. Indeed, the entire omission of the court to mention in its decision Section 167, the very provision of law relied on by the respondents, would indicate that the decision was based on the supposition that the mortgage was executed at the date specified in the *findings*. Is it not possible, and nearly probable then,

that the Supreme Court have not passed or aimed to pass on the meaning of Section 167, and that no determination has yet been made as to the power of married women to mortgage community property, under existing statutes? In this dilemma we are prompted to exclaim with Romeo, "O wilt thou leave me so unsatisfied?"

Assuming, however, what was unquestionably assumed by the counsel on each side in the argument of the case, as well as in the petition for rehearing, that the Supreme Court considered the mortgage as executed in September, 1874, after the amendment of substitution of Section 167 took effect, we then have the *opinion* of the Supreme Court, if we have not its *decision*, that a mortgage by the wife alone of the community property takes effect at the death of the husband on the interest therein which she then acquires. It requires no apology from any legal journal or member of the bar for dispassionately criticising any decision or opinion of the Supreme Court, much less for seriously inquiring what application or effect it can have. Admitting the effect given to Section 2930 by the Supreme Court as to all mortgages of real property, it will not be disputed that if the instrument is inoperative and wholly void it is not in contemplation of law a mortgage, and the determination of this question is effected by the proper interpretation of Sections 158 and 167. Section 158 reads as follows: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property which either might if unmarried," and Section 167: "The property of the community is not liable for the contracts of the wife made after marriage, unless secured by a pledge or mortgage thereof executed by the husband." Section 158, which is general in its operations, amended and restricted by the particular provision of Section 167 subsequently re-enacted.

It should be borne in mind that in *Parry vs. Kelly*, the question considered and determined was as to the effect of the mortgage executed by the wife alone, the action being to foreclose and enforce that mortgage against the community property after the death of the husband. Consequently it is

the mortgage alone, and not any independent agreement, express or implied, for the payment of the money that is now to be considered. An important and perhaps controlling question to be considered in the outset is whether Sec. 167 has for its object the determination of a condition or attribute of the community property, or whether it is intended as a limitation of the contracting powers of married women. The philosophy of the decision of the Supreme Court appears to be, that Section 167 is intended simply as a protection of the community property *as* community property, from the contracts or mortgages of married women, and that on the death of the husband the property ceasing to be community, and inuring as separate property, the protection also ceases. It may well be questioned whether, even in this view, community property would not in such case become a designation or description of the property which would not be subjected to such contracts, and therefore its exemption continue though the ownership or character of title should change. But is not Section 167 intended as a limitation of the powers of married women to contract? To construe the Section we must look to the *intent* of the Legislature in enacting it. Sec. 167 was originally a prohibition on married women from making a contract for the payment of money; it operated solely on her *power* to contract. This section was amended in 1874 to the language above stated. The language of the Legislature is—"Section 167 is *amended* to read as follows." Does it not seem clear that the Legislature simply intended to effect a change in the powers of married women to contract? Certainly if the section has the meaning the court appears to have given it, it would not be an amendment, but a new section substituted; for it would have a different purpose and different subject matter.

Now if Section 167 is at all intelligible it has a twofold meaning; first, that the community property is not liable for the contracts of the wife unless secured by the mortgage of the husband; and second, that the husband *alone* can mortgage the community property, and this is the only construction consistent with Section 172, which section reads as fol-

lows: "The husband has the management and control of the community property with the like absolute power of disposition (other than testamentary) as he has of his separate estate." Clearly this last section is intended to give the husband the sole power of disposition of the community property; and such has been the universally accepted interpretation of it. If the meaning of Section 167 were otherwise doubtful in its construction, it should be made to harmonize with Section 172. Section 167 then operates as a prohibition against the mortgaging of community property by the wife, whether such mortgage is considered as a contract or security for a contract; and if so, such mortgage would be void. That is it would not be a mortgage because forbidden by law; it would be void from the beginning, and if void as an act, it could have no effect for any purpose; neither time nor legislative power could give it validity. (Sedgwick on the Construction of Statute and Constitutional Law, p. 73; Civil Code, 35-39; *People vs. Holliday*, 25 Cal. 300.) It can not well be denied that if the law prohibits married women from contracting or executing a mortgage on community property such a mortgage would be void. Contracts forbidden by law, or against public policy, have been uniformly declared void, notwithstanding the persons making such contracts had otherwise full capacity to contract. The Supreme Court have recognized and followed the rule, that where the statutes have determined how property shall be conveyed without words of prohibition against any other mode, a conveyance executed in any other way is void. In *Flege vs. Garvey* (47 Cal. 371), under the Homestead Act as amended by Statutes of 1862, providing that alienations and conveyances of the homestead property shall be executed by husband and wife, the court decided that such property can not be alienated in any other way, and that an alienation under proceedings of the Probate Court in the estate of the husband, an insane person, was void. And so, deeds of married women that have not been executed according to the forms provided by law have been declared void. In *Landers vs. Bolton* (33 Cal. 393) it was decided that conveyances

required to be executed by married women are not valid unless acknowledged in the manner prescribed by law, and this although in the case of deeds executed by single persons it had been decided that a defective acknowledgment did not invalidate the deed. The designation was made on the grounds of public policy for the protection of the wife against fraud, coercion, or undue influence. Now if it was public policy to protect the wife in that case, is it not even more so in this? If it is public policy to protect her in the forms, is it not so in the substance? Was it not one of the purposes of the law making power in creating the quality of property, called community property, and giving the husband the sole power of disposition of the same, to protect it for the future benefit of the wife and family, and if so, when has that policy ceased? How is public policy to be determined except from the general object and meaning of the laws? The Supreme Court can not *arbitrarily* determine it. And will it be said that public policy has demanded the destruction of the last vestiges of protection to the property of married women? Rather should not the laws be construed to protect married women from the effects of undue influence, improvidence, and lack of business skill?

CRITICUS.

ABOUT MARRIED WOMEN.

Several writers have aired their learning in your JOURNAL on the above subject. In order to bring the matter to a definite point the following case is proposed for opinions thereon.

Mrs. Love, a married woman, whose husband amply supplies her with all the necessaries of life in the most extended and feminine sense of the term, even to a horse and carriage and box at the opera, is the owner of a house and lot, her separate property, which is rented by her and brings her an income of one hundred dollars per month, which she receives

personally from her tenants, she residing with her husband in a house belonging to him.

Mrs. Love proposes to give a party for the reception and private exhibition of Signor Piccolomini, the last new tenor out. Mr. Love, not being "gone on tenors," says he will not pay for the feed, and the same can not be considered as coming under the head of necessaries to the comfortable maintenance of a wife.

Thereon Mrs. Love borrows of Mr. Dove five hundred dollars, and gives him therefor her promissory note in the usual form, in which no reference is made to her separate property, nor any words of charging the debt thereon. With the money so obtained Mrs. Love pays for the reception supper given to her guests, her husband not being present at the time. She fails to pay the note.

QUESTION.

Can judgment thereon be recovered against her under the laws of this State, she claiming all the disabilities kindly conferred on her by law?

What should be the form of the complaint?

J. W.

Supreme Court of California.

JULY TERM.

[No. 10,352.]

[Filed July 22, 1878.]

PEOPLE vs. BELL.

CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION—COLLATERAL AND IRRELEVANT MATTER CAN NOT BE CONTRADICTED—WHEN.—If a question is put to a witness which is collateral or irrelevant to the issue, his answers can not be contradicted by the party who asked the question, but is conclusive against him.

IDEM.—CASE.—The defendant, indicted for murder, and being a witness on his own behalf, upon cross-examination by the prosecution, testified that the deceased was a profane swearer and in the habit of using profane language, and had called him and his brother "damned sons of bitches" at the quarrel which resulted in

his death. The prosecution then called several witnesses in rebuttal as to the testimony showing that the deceased was a profane swearer and used profane language, to which the defendant excepted. *Held:* that such facts were purely collateral, having no reference whatever to the guilt or innocence of the defendant, and having been first brought out by the prosecution, the answers were conclusive and could not be contradicted. The rebutting testimony was introduced to impeach the witness and may have prejudiced his case before the jury.

Appeal from the Thirteenth District Court, Merced County.

The defendant was indicted for murder, and the jury agreed upon a verdict of manslaughter.

The remaining necessary facts are set forth in the opinion.

D. S. Terry, for defendant.

Attorney-General, for the People.

PER CURIAM.

The defendant was examined as a witness on his own behalf, and on his cross-examination by the prosecution testified that the deceased, on the occasion of the quarrel which resulted in his death, called the defendant and his brother "damned sons of bitches." The witness further testified, "That is not the first time I have heard him use that kind of language. Have heard him use it frequently. I don't know as he was a practical swearer. He was a profane swearer."

The prosecution called several witnesses in rebuttal, who were permitted to testify against the objection of the defendant, that they were intimately acquainted with the deceased in his life-time, and that he was not a profane swearer, and that they had never heard him use profane language. The defendant excepted to the ruling of the court in admitting this evidence, and we think the exception was well taken. Whether or not the deceased was a profane swearer, or in the habit of using profane language, was a purely collateral matter, having no reference whatever to the guilt or innocence of the defendant. The first evidence on that point was brought out by the prosecution on the cross-examination of the defendant, and in such cases the rule is: "That if a question is put to a witness which is collateral or irrelevant to the issue, his answer can not be contradicted by the party who asked the question, but is conclusive against him." The

case of *People vs. McKeller*, decided at the last April term of this court, is decisive of the point. (See also 1 Greenl. Ev., Sec. 449.) The evidence in rebuttal could have been introduced for no other purpose than to impeach the defendant as a witness, and we can not say that it did not prejudice his case before the jury.

Judgment and order reversed, and cause remanded for a new trial.

Court of Appeals of Kentucky.

APRIL 10, 1878.

JEFFERSON, MAD. AND IND. R. R. CO. ET AL., VS. ESTERLE.

1. PUBLIC STREET—EXCLUSIVE USE—JOINT POSSESSION OF ADJACENT OWNERS WITH THE PUBLIC.—Although the fee of a public street is in adjacent proprietors, the exclusive use of the street is in the public, and adjoining owners have, and can have, no possession or right of possession, in fact or in law, to the street or any portion of it. There can be no such thing as a joint possession by the owners of the fee with the public in the street.
2. ACTION—RAILROAD ON PUBLIC STREET—INJURY TO PROPERTY OF ADJACENT OWNERS—OBSTRUCTION.—An owner of premises adjoining a public street on which, by permission of the authorities, a railroad track is laid over which trains are operated, may recover for injury to his premises from smoke, sparks, or cinders from the trains, for the cracking of walls caused by such trains, etc., and also for obstruction to ingress and egress to and from the premises.
3. DAMAGES—INJURY TO PROPERTY OF ADJACENT OWNERS BY RAILROAD ON PUBLIC STREET.—In estimating the damage, the jury should ascertain the value of the property immediately prior to its becoming known that the tracks were to be laid, and then determine what proportion of that value was taken from the premises by the obstruction of the street and the annoyances incident to the operation of the road.

Action on the case. The plaintiff claims that as an owner in fee of a house and lot in Louisville, he suffered damage from the laying down of three railroad tracks on the street fronting his premises; that the movement of heavy trains over these tracks caused the walls of his house to crack, and smoke, cinders, etc., to be emptied into the house through windows and doors, whereby the property has diminished in

value three thousand dollars. The other facts sufficiently appear in the opinion.

I. & J. Caldwell & Winston, Bullock & Anderson, R. Houston, and C. H. Gibson, for appellants.

R. W. Wooley, for appellee.

LINDSAY, C. J. (*After stating the facts.*) It may be conceded, for the purposes of this case, that there is nothing in the record to show that the public owns the fee in the land upon which the street is located, and that the presumption is that the fee to the centre of the street is in the owners of the adjacent and abutting lots of land. (8 Bush, 679.) But the exclusive use of the street is in the public, and the owners of the abutting lots have, and can have, no possession or right to the possession, in fact or in law, to the street or any portion of it. An unlawful entry on the street is in no sense an entry on the possession of these lot owners. The unreasonable appropriation of the street may amount to an obstruction of their right to its use as a means of ingress to and egress from their lots, but from the very nature of things can not amount to an injury to their possession. Whatever may be the rule as to the relative rights of the public and the owners of the fee in ordinary highways, to which the exclusive use and possession may not be absolutely necessary for the purposes of the public, there can be no question that, in "a large and populous city," there can be no such right as that of a joint possession by the owners of the fee with the public in the streets. The owners of the fee are as completely subordinated to the superior rights of the municipality to control, manage, and possess its streets as the public in general. The owner of a lot fronting on a particular street has a peculiar interest in that street. His title carries with it, as an essential incident, certain valuable and indispensable services and easements in and over that street, which are as inviolable as his property in the lot itself. (8 Dana, 289; 17 B. Mon. 772; 9 Bush, 264; 10 Bush, 288.) But this peculiar right does not depend upon or spring out of the ownership of the fee. It exists as well when the fee is in the public as

when it is in the lot owner, and its existence is in no sense inconsistent with the exclusive actual possession of the street by the public. The appellants are not mere trespassers. They entered upon the street with the approval and express consent of the city authorities, and they have the right, so far as the general public is concerned, to keep and maintain their railway tracks, and to pass their trains over them. But notwithstanding this license, if the tracks have been so located as to unreasonably obstruct appellee's means of ingress and egress over the street to and from his lot; or if his houses have been injured by having smoke, sparks, or cinders thrown or blown into or upon them; or if their walls had been cracked by the rapid movement of heavy trains of cars, he is entitled to recover for the damages directly resulting from all or any one or more of these causes. (10 Bush, 382, 263; 9 Bush, 288.) The measure of the damages which the appellee may recover, if entitled to recover at all, is the diminution in the value of his houses and lot occasioned by the location of appellants' tracks, and the uses to which they are authorized to put them by the grants from the city authorities. (10 Bush, 382; 9 Bush, 264.) The jury should ascertain what the value of the property was just before it becomes generally known that the appellants' roads were to be located in front of it, and then determine what proportion of that value was taken from the house and lot by the obstruction of the street, and the annoyances incident to the movement of engines and trains of cars along and over the appellants' roads. This rule is simple, and it strips the question of the complication and confusion which must necessarily arise in an attempt to distinguish between the natural increase of the value of the particular piece of realty, and the increase attributable to the location of the line of railway. Benefits arising directly from, or out of an unauthorized act, may sometimes be considered in the determination of the sum to be recovered by the injured party, but in all cases these benefits must be direct and immediate. They must be confined to the proximate consequences of the act complained of, and be of like kind with the opposite injuries for

which the recovery is sought. If the railways afford appellee increased or additional facilities for ingress or egress to and from his house, or for the movement of articles in which he may deal, or supplies which it is necessary that he shall procure, his benefit may be taken into consideration in estimating the damages he has sustained. But supposed benefits arising from the increased general prosperity of the neighborhood, and the enhanced vendible value of real estate in the particular locality, even if it be a recognized incident to the location of the public work, are too remote and contingent to be taken into consideration in the question of damages to appellee's house and lot resulting from the special injuries to which he has been subjected. Such supposed benefits flow not immediately from the railways obstructing the street, nor from the movement of the cars over them, but from the investment of capital in a work of general public utility, and the enterprise and activity of persons attracted and specially benefited by their proximity to the line of railways. The right of appellee to be compensated for the special injuries he may sustain can not be denied him because of the mediate and consequential benefits resulting to him in common with the local community at large. (17 Pick. 58; 30 Chand., Wis. R. 46.) Reversed and remanded.

Supreme Court of Iowa.

APRIL, 1878.

MATTER OF ARTHUR vs. CRAIG.

CONDITIONS IN A PARDON VALID AND ENFORCEABLE.—A person convicted of larceny was pardoned on condition that he would refrain from the use of intoxicating liquors, and perform other acts. On violating the condition as to the use of intoxicating liquors, he was re-arrested and taken to prison to serve his sentence. *Held*: that the conditions in the pardon were valid, and the re-imprisonment was proper.

The petitioner on these proceedings, Arthur, was convicted of larceny and sentenced to imprisonment for ten years;

subsequently he was pardoned by the governor of Iowa, the pardon containing these conditions:

"This pardon is granted upon the following conditions, and acceptance and release under this instrument shall be an acceptance of each and all of such conditions, viz.: First, said R. D. Arthur shall, during the remainder of the term of his sentence, refrain from the use of intoxicating liquors as a beverage. Second, he shall, during that time, use all proper exertion for the support of his mother and sister. Third, he shall not, during said term, be convicted of any offense against any of the criminal laws of this State. Should said Arthur violate either of these conditions, he shall be liable to summary arrest upon the warrant of the governor of the State for the time being, whose judgment shall be conclusive as to the sufficiency of the proof of the violation of the first and second conditions, and to be confined in the penitentiary of the State for the remainder of the term of his sentence, and this instrument to be summarily revoked."

Arthur, in writing, accepted these conditions. Subsequently he violated the one against the use of intoxicating drinks, and was charged with other acts of a criminal character. The governor thereupon issued a warrant for his re-arrest and imprisonment. The warrant contained the following recital of the reasons for which it was issued: "And whereas, said Arthur has, as I have been informed and am convinced, violated the first of the conditions of the pardon aforesaid by drinking intoxicating liquors repeatedly, so much so as to become intoxicated; and, moreover, has been guilty of criminal practices which, while not of themselves constituting a violation of said condition, are yet of such a nature as to aggravate his offense in violation of said first condition." Said warrant proceeds as follows: "Now, therefore, by virtue of the authority vested in me by law, and by reason of the reservation in said conditional pardon, and of the violation thereof, I, J. G. Newbold, Governor of the State of Iowa, do hereby revoke said conditional pardon, and do remand said Richard D. Arthur to the penitentiary of the State, there to be confined for the remainder of the

term for which he was originally committed to said penitentiary, and I do hereby require all peace officers within the State to whom this may be shown to aid and assist in arresting and returning said Arthur to said penitentiary."

The plaintiff was, on this warrant, re-arrested and consigned to the prison where he had before been confined. He thereupon procured a writ of *habeas corpus*, claiming that his imprisonment was illegal for these reasons: (1) Because the governor has no power to limit a pardon and make it dependent upon conditions, and that the pardon is absolute and the conditions void. (2) If the governor has power to pardon conditionally, judicial authority must be invoked, and determination had upon the question as to whether or not he has forfeited his liberty by the violation of the conditions of his pardon. The governor, having no judicial power in this respect, can not issue a warrant of arrest on a *mittimus* to imprison, such authority belonging exclusively to the courts.

A demurrer was taken to the petition, but the same was overruled and the plaintiff was discharged, whereupon an appeal was taken.

D. N. Sprague and T. F. McJunkin, for appellant.

F. H. Semple and T. H. Craig, for respondent.

ROTHROCK, C. J. The first question presented is: Has the governor of the State power to grant a conditional pardon? The Constitution, Section 16, Article 4, provides: "The governor shall have power to grant reprieves, commutations, and pardons, after conviction for all offenses, except treason and cases of impeachment, subject to such regulations as may be provided by law." The only restrictions upon the pardoning power, imposed by law, relate to pardons for murder in the first degree. (Code, § 4712.) As to all other crimes the power to pardon is given by the Constitution, unrestricted by any statute.

In vol. 4, p. 407, of Blackstone's Commentaries, it is said: "A pardon may also be conditional, that is, the King may extend his mercy upon terms which he pleases, and may annex to his bounty a condition either subsequent or prece-

dent, on the performance whereof the validity of the pardon will depend; and this is by the common law." This rule has been followed by adjudications in England, and has been so generally adopted by the courts of this country, under constitutions providing an unrestricted pardoning power, that the law must now be regarded as settled, that the executive may annex to a pardon any condition precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed. (*People vs. Potter*, 1 Parker, 47; 1 Bishop on Crim. Law, §§ 711, 712; *U. S. vs. Wilson*, 7 Pet. 150; *Ex parte Wells*, 18 How. 307; *Flavell's case*, 8 Watts & Serg. 197; *State vs. Smith*, 1 Bailey, S. C. 283.)

The remaining question in the case is as to the effect to be given to a conditional pardon. In *State vs. Smith, supra*, it is said: "A pardon *ex vi termini* pre-supposes a wrong done or an offense committed, and forgiveness of the party injured; and, as the act of pardoning must necessarily be voluntary, the injured party must have the power of prescribing the atonement to be made; and it necessarily follows that the offender has the right to accept or not to accept the terms proposed. He may prefer to make the reparation demanded by law for the wrong done or the offense committed, or the atonement substituted, at his election."

The petitioner, in this case, was serving a sentence imposed by the law for a crime committed. He had no legal right to demand a release from imprisonment. The pardon offered to him was an act of grace or favor upon the part of the State by its executive. He was free to accept the pardon with its conditions, or to reject it and serve out his sentence. He chose the former; accepted the pardon, and stipulated that for a violation of the conditions the instrument might be summarily revoked by the governor, and he should be remanded to the penitentiary for the remainder of the term of his sentence.

The conditions imposed are not illegal, immoral, or impossible to be performed, and to enforce them deprives the prisoner of no legal right. It may further, with propriety, be said that if the governor issued his warrant for the arrest

and imprisonment of the petitioner upon an insufficient showing that he had violated the condition of the pardon, and he should be required to serve out the remainder of his term, he will only perform that which the law, by his sentence, solemnly adjudged to be just.

The court below overruled the demurrer upon the ground that the governor could not, without notice to the petitioner, and without a hearing, determine the condition broken, and upon his warrant imprison in the penitentiary, and that he could not exercise the judicial functions necessary to determine the question, because the Constitution gives this power to the courts alone.

Certain adjudicated cases were relied upon as holding that a violation of a conditional pardon "should be judicially determined, and the execution of the sentence enforced by the court pronouncing it, or some other court of competent jurisdiction." (*People vs. Potter*, 1 Parker, 47; 9 Ind. 20; *Com. vs. Fowler*, 4 Call., Va. 35.) Without entering into a discussion of the questions which are determined in these cases, it is sufficient to say that the instrument in the case at bar is unlike any to which our attention has been called. It expressly provides that the governor may, by his warrant, revoke it upon such showing of a violation of the condition as he may deem sufficient. Upon its revocation the legal *status* of the petitioner must be regarded the same as it was before the pardon was granted. It must be remembered that the pardon was an act of grace. The petitioner had no right to demand it. It was founded on no right which he could enforce in any court. What he accepted was in the nature of a favor or gift. It was not such a contract as entitled him to have a judicial determination of forfeiture in the face of his stipulation that the governor might revoke it upon such showing as might be satisfactory to him.

We think the demurrer should have been sustained, and that the petitioner should have been remanded to the penitentiary.

Recent Decisions.

Foreclosure of deed of trust—Requisite parties.—1. In a suit of proceeding in chancery to foreclose a deed of trust in the nature of a mortgage, the trustee named in the deed of trust is an indispensable party to the record.

2. It is the settled doctrine of courts of equity in this country, that a party holding the legal title to property involved in a judicial proceeding must be made a party to the decree.—*Walsh vs. Truesdell*. Appellate Court of Illinois (7 Cent. L. J. 8).

Setting aside verdict of jury for misconduct of officer.—After a verdict of guilty had been returned by a jury against the accused for the offense of obtaining by false pretenses the signature of a firm to a check of \$850, and in support of a motion for a new trial affidavits were filed proving that the bailiff who had the jury in charge, and who had testified on the trial on the part of the prosecution to material facts against the prisoner, was with the jury in their room the greater part of the time while they were deliberating on their verdict, and no explanation was made of the presence of the officer with the jury in their consultations together, and the State made no showing that the rights of the prisoner were not prejudiced by the acts and conduct of such officer and witness. *Held*: that the verdict should have been set aside and a new trial granted.—*State vs. Snyder*. Supreme Court of Kansas (7 Cent. L. J. 9).

Negligence—Proximate and remote cause.—The defendant put a dangerous spiked hurdle in a private road over which he and others had rights of way. Some person, without the knowledge of the defendant, moved the hurdle a few yards. On a dark night, the plaintiff, who was not a trespasser, without negligence, and thinking to avoid the original position of the hurdle, came into collision with it, and was injured. *Held*: that the plaintiff could recover from the defendant. (*Mangan vs. Atterton*, 4 H. & C. 388, L. R. 1 Ex. 239, commented on.)—*Clark vs. Chambers*. English High Court of Justice, Queen's Bench Division.

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Current Topics.

THAT a married woman has capacity under the statutes of our State to make a promissory note, which may be enforced by judgment and execution, notwithstanding that she express no intent to charge her separate estate, has been decided by our Supreme Court, and much discussion has ensued as to the correctness of the decision. Many are bold enough to assert that the present court or some future one will undoubtedly overrule the decision upon the grounds of correct interpretation of the statutes. Now, it is interesting to consider the effect of a subsequent decision overturning that principle announced in *Wood vs. Orford*, thus altering the construction given to the statutes by that decision, as to all contracts of such a nature, made subsequent to the decision in *Wood vs. Orford*, and prior to a decision overruling the same.

Would the note be rendered invalid by the subsequent decision if made prior to it? Could it be enforced in any manner?

The unconstitutionality of laws impairing the obligations of contracts have been extended beyond the actual making of laws, and in an early case the Supreme Court of the United States held that the sound and true rule is that if the contract when made was valid by the laws of the State as then expounded by all the departments of the government, and administered in the courts of justice, its validity and obligation can not be impaired by any subsequent action of legislation or decision of the courts altering the construction of the

law. (*The Ohio Life and Trust Co. vs. Debolt*, 16 Howard, 432.)

This ruling has been followed in many subsequent decisions, and we suggest that the principle is not carried too far and rests upon grounds of the strictest equity and justice.

That the highest court of a State should establish a construction of statutes under which right, duties, and obligation accrue, made and entered into with a view to such a construction, and then by its own oscillations or the disposition of a future court such a construction is altered, sweeping away all vested rights under former constructions, certainly is a deterioration as broad and productive of injury and ruin as the enactment of positive statutes. If the record be made to present the federal question we see no reason why there does not exist a remedy.

In *People vs. Herrera* the Supreme Court affirms the judgment of the court below. The court of its own motion gave the following instruction: "Possession of property recently stolen, if such possession is not explained, is a circumstance to be considered by the jury in arriving at a verdict; a failure or refusal to explain such possession may be considered by the jury as a circumstance showing the guilt of the accused." Also, "that if the prisoner failed to account for such possession, or to show that such possession was honestly obtained, it is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts."

The defendant says the first instruction is erroneous, because stolen property *tends* only to show guilt; that the bare possession is not enough of itself to raise a presumption of guilt as will lead to a conviction unless repelled. That the second is erroneous, because the court assumed "other suspicious facts," which ought to have been left to the jury.

In *Waugh vs. Wingfield*, now before the Supreme Court, the appellant filed a petition setting forth the fact of an appeal from the judgment of the court below, and the further

fact that a draft of a bill of exceptions had been presented to the judge of the District Court, and that no amendments had been proposed by the respondent, but he, the said judge, refused to settle and certify the same, and refused to settle any bill of exceptions, and prays that the same may be settled in the Supreme Court as provided by statute. The court denied the petition, but directed that a writ of mandate be issued to said judge compelling him to settle and certify the bill of exceptions or show cause, returnable before said court.

In Brine vs. Hartford Fire Ins. Co., in the Supreme Court of the United States, at the October Term, 1877, it was held that the laws of the State in which land is situated control exclusively its descent, alienation, and transfer from one person to another, and the effect and construction of instruments intended to convey it. All such laws in existence when a contract in regard to real estate is made, including the contract of mortgage, enter into and become a part of such contract.

A State statute, therefore, which allows to the mortgagor twelve months to redeem after a sale under a decree of foreclosure, and to a judgment creditor of his three months after that, governs to that extent the mode of transferring the title and confers a substantial right, and thereby becomes a rule of property. This right of redemption after sale is, therefore, obligatory on the federal courts, sitting in equity, as on the State courts, and the rules of practice of such courts must be made to conform to the law of the State, so far as may be necessary to give substantial effect to the right.

In the case of *Lamb vs. Walker* (38 L. T. Rep. N. S., 643), recently decided by the Queen's Bench Division of the English High Court of Justice, the plaintiff sued the defendant for injury to plaintiff's buildings by mining operations of defendant on his own lands. A special referee found that in addition to the injury already incurred, the plaintiff would incur injury in the future, and assessed the prospective dam-

ages at £150. It was held by a majority of the court that such damages were recoverable. *MANISTY*, J., who delivered one of the prevailing opinions, states that where no injury has accrued in a case of this kind, prospective damages are not recoverable. So long as plaintiff's right to have his land and house supported by the adjoining strata is not interfered with, he has no cause of action, but as soon as the support which was left proved insufficient, defendant's act in withdrawing the necessary support became wrongful, and *damnum* and *injuria* concurring, plaintiff's cause of action accrued. The defendant contended that if this was so, the true measure of damage was the injury actually done up to the time of the commencement of the action, and the remedy for subsequent injuries was by actions from time to time as the injuries should accrue. But the answer to this was that it is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all, and that in this case there was but one cause of action. The leading case cited on this subject was *Backhouse vs. Bonomi* (9 H. L. 503), where it is held that no cause of action arises in respect to what a man does on his own land until actual damage arises therefrom to the property of the adjoining owner. In this case, when in the lower court (E. B. & E. 638), it was said that "where a right of action is thus vested, and an action is brought for the act alleged to have occasioned the injury, the damages given by the jury for that act must be taken to embrace all the injurious consequences of that act, unknown as well as known, which shall arise thereafter, as well as those which have arisen; for the right of action is satisfied by one recovery." See, also, as sustaining the same view, *Mecklin vs. Williams* (10 Exch. 259); *Homer vs. Knowles* (6 H. & N. 454).

It has been held by the Court of Appeals of Kentucky, in the case of *Woods vs. Finnell*, that where a civil suit is prosecuted with malice and without probable cause the defendant is entitled to recover damages, which should be confined to loss of time, the reasonable expenses incurred in the de-

fense of the action beyond the ordinary costs and fees to counsel. Citing *Classon vs. Staples* (42 Vt.); *Watson vs. Freeman* (Esp. Dig. 527); *Whipple vs. Fuller* (11 Conn.); *Elza vs. Smith* (2 Chit. Report, 304).

A QUESTION of liability of sureties on an undertaking in attachment for the costs of the defendant, incurred in defending the suit other than the costs accruing under the attachment itself, arose in the late case of *Lock vs. Chace* in the County Court of Santa Cruz County. A subscriber has been kind enough to forward us a statement of the case, from which it appears that Chace was one of the sureties on an undertaking in attachment sued out by Rice in an action on a contract against Lock. Rice was unsuccessful and could not establish his claim, whereupon judgment was given against him and in favor of the defendant Lock for his costs, amounting to \$62 50. The writ of attachment was not claimed to be improperly or irregularly issued; the plaintiff simply failed in his suit. Rice, being insolvent, Lock now prosecutes this action against Chace, one of the sureties, to recover \$62 50, the amount of the judgment for costs rendered in his favor.

Chace contends that he is only liable under the undertaking for such costs only as accrue by reason of the attachment; that the costs awarded defendant arose not by virtue of the attachment, but out of the action in the first instance; that the purpose of the attachment is to secure the debt to the plaintiff, and the undertaking to secure the defendant in damages against the wrongful seizure of said property and all costs accruing by virtue of such seizure, and that in no manner can it be held that the costs in defending the action accrued by reason of the attachment.

The undertaking was in the usual form. The court gave judgment for the plaintiff. We believe the Supreme Court have never passed upon this question, and it may be considered as unsettled and worth the attention of the profession.

Supreme Court of the United States.

MAY 13TH, 1878.

THE MILLIGAN AND HIGGINS GLUE CO. vs. UPTON.

PATENT—NOVELTY—VALUE—COMBINATION.—To render an article new in the sense of the patent law, it must be more efficacious, or possess new properties by a combination with other ingredients, not from a mere change of form produced by a mechanical division.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Bill in equity for the alleged infringement of a patent owned by the complainant, for an article of manufacture denominated "instantaneous or comminuted glue;" and to obtain a decree that the defendant account for and pay over to it the gains and profits acquired by him from the making and sale of the article, and be enjoined from further infringement.

The patent bears date July, 1870, and was issued to the assignors of the complainant, upon the surrender and cancellation of a patent issued in October, 1864, to Emerson Goddard as the alleged inventor of the article in question, and afterward transferred to them. In the specification accompanying the reissue the patentee states that he has invented a new and useful article, which he denominates "instantaneous or comminuted glue;" and then proceeds to describe the glue of commerce previously found in the market, and to point out the inconveniences attending its use, and the manner in which they are obviated by his invention. He states that the ordinary glue of commerce was then sold in the form of hard, angular flakes, and that it required a good deal of time to prepare it for use—first soaking it in cold water and afterward by heating it in a hot water bath until the flakes were dissolved. The time thus occupied, he says, is saved by his invention, as his article does not require to be prepared for solution by soaking, is quickly permeated by water, so that it can be dissolved in large quantities ready

for mechanical use in less than five minutes, and in smaller quantities for domestic use in less than one minute. Another objection stated to the glue of commerce as previously sold is that great inconvenience was experienced in retailing it from the difficulty of putting it up in small packages, by reason of the sharp, angular corners and edges of the broken flakes which cut the wrappers, causing a waste of time and stock. The new article, he says, can be put up by machinery or by hand into packages of uniform size and of regular form and weight, similar to those in which ground spices are put up for domestic use and sold by retail traders. He also states that the new article has a more pleasing appearance than the ordinary glue of commerce, in that it has a white color, and is consequently more merchantable and brings a higher price. The specification then proceeds to describe the best process which the inventor has devised for making such instantaneous glue, and the apparatus or machinery he has used. These consist of a breaking machine for crushing the flakes into small pieces, and of a rasping or grating machine for comminuting the broken pieces into uniform grains. But for these mechanical means or processes the patentee makes no claim, observing that it is obvious that other means or processes of crushing or reduction may be used to manufacture his article out of dry flake glue or gelatine by a crushing or breaking operation, and that his claim is only to the comminuted glue as a new article of manufacture. The court dismissed the bill, and the complainant appealed.

Charles M. Reed and Edmund Wetmore, for appellant.
Chauncey Smith and George L. Roberts, for appellee.

FIELD, J. (*After stating the facts.*) The invention claimed is not any new combination of ingredients, creating a different product, or any new mechanical means by which a desirable change in the form of a common article of commerce is obtained; but it consists only of the ordinary flake glue reduced to small particles by mechanical division. The advantages from such division consist in its more ready and

rapid solution, its greater convenience for packing and retailing, and its white appearance and enhanced salability. The whole claim is to an old article of commerce in a state of mechanical division greater than previously used, but unchanged in composition and properties; and the benefits arising from the increased division are such as appertain to all soluble objects when divided into minute particles. This statement, which is substantially a repetition in a condensed form of that by counsel, is supported by reference to numerous instances where similar results have followed the mechanical division of soluble objects into small particles; but we do not deem it necessary to mention them, for the point involved presents no difficulty. There is nothing new in the fact that the solution of a soluble object is accelerated by increasing its fragmentary division; nor is there anything new in the fact that articles with rough angles and edges can be more readily put into packages without injury to their wrappers when reduced by mechanical division into small particles; nor is there anything new in the fact that such articles generally improve in appearance by granulation or powdering.

A distinction must be observed between a new article of commerce and a new article which, as such, is patentable. Any change in form from a previous condition may render the article new in commerce; as powdered sugar is a different article in commerce from loaf sugar, and ground coffee is a different article in commerce from coffee in the berry. But to render the article new in the sense of the patent law, it must be more or less efficacious or possess new properties by a combination with other ingredients, not from a mere change of form produced by a mechanical division. It is only where one of these results follows that the product of the compound can be treated as the result of invention or discovery, and be regarded as a new and useful article. The three advantages attributed to comminuted glue over the flake glue were, previous to the alleged invention of Goddard, recognized as following from a division of soluble objects into small particles, in the treatment of a great variety of

articles in constant use in the kitchens of families and in pharmacy. Where certain properties are known to belong generally to classes of articles, there can be no invention in putting a new species of the class in a condition for the development of its properties similar to that in which other species of the same class have been placed for similar development; nor can the changed form of the article from its condition in bulk to small particles by breaking or bruising or slicing or rasping or filing or grinding or sifting, or other similar mechanical means, make it a new article in the sense of the patent law.

This subject is elaborately considered by the presiding justice of the Circuit Court in his opinion, with reference to numerous adjudications of the courts of England and the United States; and in his conclusion on this point we concur. Decree affirmed.

United States Circuit Court, E. D. Michigan.

APRIL TERM, 1878.

FONDA vs. BRITISH AMERICAN ASSURANCE CO.

ACTION—FOREIGN CORPORATION—AGENT TO RECEIVE PROCESS—FEDERAL PROCESS.—A foreign corporation which complies with the State law requiring it to have an agent in the State upon whom process in actions against it can be served, is constructively present in the State, and is amenable to the process of the federal courts.

Action brought by summons in which defendant is described as "a body corporate, organized and existing under the laws of Ontario, in the Dominion of Canada, and an alien and a subject of the Queen of Great Britain and Ireland." The question of jurisdiction was raised, by motion, based on the fact that the defendant is not an inhabitant of, or found within, this district.

BROWN, J. (*After stating the facts.*) If the service of the summons in this case is supported at all, it must be by vir-

ture of the statute of this State, which provides that every foreign insurance company shall file with the Secretary of State a resolution, authorizing any agent, duly appointed by resolution under the seal of the company, to acknowledge service of process for and in behalf of such company, "consenting that service of process upon any agent shall be taken and held to be as valid as if served upon the company or association, according to the laws of this State, or any other State, and waiving all claim of error by reason of such service." That such service is valid and regular has not only been repeatedly recognized by the Supreme Court of this State, but was held to be valid as applied to process from the State courts in *Ins. Co. vs. French* (18 How. 404). It is true the question was not discussed whether such service would be valid as applied to process of the federal court, but there is no intimation that it would not be so considered. In the case of the *Railroad Co. vs. Harris* (12 Wall. 65), the Supreme Court observed, in speaking of a foreign corporation: "It can not migrate, but may exercise its authority in a foreign territory, upon such conditions as may be prescribed by the laws of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly." The question at issue here, however, was not directly passed upon. In *Knott vs. Ins. Co.* (2 Woods, 479), jurisdiction in a similar case was sustained. It seems to me the very object of the State law was to provide that no insurance company should do business within the State that was not capable of being sued there, and that the constructive presence of a corporation in the person of its agent should be recognized as well by us as by the State courts. The cases holding that a corporation is a citizen only of the State in which it is organized are quite as applicable to State courts as to federal courts, and would be as effectual to prevent a foreign corporation being sued in the State courts of another State as in the federal courts. Now, if statutes like this may be held to constitute a constructive presence of the corporation in another State for the purpose

of the service of process from the State court, I see no reason why it should not operate equally in favor of process from this court. And if a foreign corporation may appear after the issuing of process and defend a suit (of which no doubt was ever entertained), it is difficult to see why it may not agree beforehand that it will accept service of all process that may be served upon it.

Authorities considered in this opinion: 14 Pet. 519; 8 Wall. 168; 1 Black, 286; 12 Wall. 81; 1 Blath. 628; 2 Biss. 26; 4 Blatch. 120. Jurisdiction sustained.

English Court of Appeals.

JANUARY 14, 1878.

BERGHEIM vs. GREAT EASTERN RAILWAY CO.

LIABILITY OF CARRIER OF PASSENGERS FOR LUGGAGE.—The liability of railway companies as common carriers does not apply in the case of luggage over which they have not absolute control. Plaintiff went to defendant's station some time before the train started. A porter, by plaintiff's direction, placed his bag in the carriage. Plaintiff went away for a short time, and on his return the bag was gone. In an action to recover the value of the bag, the jury found that neither defendant nor plaintiff had been guilty of negligence. *Held*: that defendant was not liable as a common carrier, and therefore was entitled to judgment.

Appeal from the Common Pleas Division. The action was brought to recover the value of a traveling bag belonging to the plaintiff which had been lost from a passenger carriage on the defendants' railway. The plaintiff, who was going to Yarmouth by the Great Eastern Railway, arrived at the defendants' station at Shoreditch a considerable time before the train started. He directed a porter in the defendants' service to put his traveling bag on the seat of the carriage in which he intended to travel. The plaintiff asked the porter whether the bag would be safe, and the porter replied that it would be safe, and that he would be there himself until the train started. The plaintiff then went away to the refreshment room, and on his return the bag was missing and it never was found.

At the trial before MANISTY, J., the jury found that the carriage was a proper place in which to put the bag; that the porter was acting in the scope of his employment in putting the bag into the carriage; that the porter had received the bag as the defendants' servant; that no felony had been committed by the servants of the defendants, and that neither the plaintiff nor the defendants had been guilty of negligence.

On these findings MANISTY, J., directed judgment to be entered for the defendants, and the plaintiff appealed.

Grantham, Q. C., and R. E. Webster, for plaintiff.
Metcalf, Q. C., and Lindsell, for defendants.

COTTON, L. J. (*After stating the facts.*) It has been found that neither the company nor the plaintiff was guilty of negligence. The company, therefore, can not be held liable, unless they are to be held to have undertaken the liability of common carriers in respect to the bag, the loss of which is the cause of complaint in this action. The liability of a common carrier is, as compared with that of other bailees, exceptional. He is answerable for the loss of goods intrusted to him as such, though the loss be in no way caused by any default on his part. He is considered as having contracted to insure—that is to say, as having contracted to carry and deliver safely and securely (the act of God and of the Queen's enemies excepted), the goods of which he, as common carrier, is bailee. The reason why the law implied that this is his contract was that the carrier had by himself or his servants during the bailment, at times and in places where he could not even be supervised, the exclusive control and care of the goods intrusted to him by the owner, and that the law considered it necessary, in order to prevent frauds, to impose on those who contracted to carry goods as common carriers the obligation also to undertake to insure their safety. The rule and the reason given are thus stated by HOLT, C. J., in *Coggs vs. Bernard* (Ld. Raym. 909): "The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the King.

For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing ; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." This rule, though stringent, was apparently founded on good sense. But if this implication had been applied to goods of which, in consequence of the act of the owner, the carrier had not during their carriage the exclusive or absolute control or care, it would in our opinion have been unreasonable. So to apply it would have been to extend a contract of insurance, which the law had originally implied because the carrier had the exclusive, or at least absolute, control and care of the goods, to goods as to which his position was entirely different. When the reason for raising an implied contract does not exist, the implication ought not to be made, and in none of the earlier cases which dealt with and established the common carriers' liability was a contract of insurance implied in respect of goods over which he had not absolute control. In our opinion, as regards goods in such a position, no such contract ought to be implied. The next question, then, is whether it can be said that goods which, at the request of a passenger, are put into the carriage in which he travels, are under the control and care of the company to such an extent that a contract of insurance on the part of the company can be implied. They are put into that carriage because they may be required by the passenger during the journey, or because he wishes to take special care of them, and to have them under his eye ; or because he desires to take them away with him as soon as the train stops. At all events they are put in that carriage at the request or with the consent of the passenger in order that he may have, or in such manner that

he has, some control over them during the transit. While the train is in motion the company can exercise no control over the goods as distinct from the control they have over the train. There may be in the same carriage with the owner of the goods other persons who, by reason of the passenger's own negligence, may be tempted or enabled to injure the goods or to deprive the owner of them. If the company are in respect of the goods liable as common carriers, though this loss may happen by no fault of theirs, they must nevertheless make good the loss; and even if the loss happens by reason of the passenger's negligence, the company will be liable unless they can fulfill the difficult burden of proving that the negligence of the passenger occasioned the loss. This would not, in our opinion, be reasonable. But it was urged that, at least when the owner is reasonably absent from the carriage at stations during the journey, the company must be liable as common carriers for the goods of the passenger, and that the contract of the company may be considered as a contract of insurance with an exception that while the train is in motion and the owner in the carriage with some charge of the goods, there should be a different liability. But this would be implying a new form of contract entirely different from the contract of insurance implied in the case of a common carrier. Again it is said that the company have been held to be common carriers of passengers' luggage which is put into the van or other place appropriate for the purpose, and from this it is argued that the company, being common carriers of some passengers' luggage carried in a passenger train, are so of all such luggage carried in the train. But the real question is whether, as regards the particular goods, there is an implied contract of insurance. This must depend on the circumstances under which these goods are carried, and though the company do receive some passengers' luggage carried by a passenger train under circumstances from which a contract of insurance can be implied, it does not follow that this is the case as regards articles which, though carried by the same train, are received and carried under different circumstances. As regards that por-

tion of a passenger's luggage which is, at his request or with his consent, placed in the same carriage in which he is to travel, we think, for the reasons given above, that there is no sufficient ground upon which a court can properly make a presumption that the company carry it under a liability or implied contract to carry it safely at all hazards, the act of God and of the Queen's enemies alone excepted. But then it is urged that, if the company are not liable to the extent insisted on, they are not in any way liable for the luggage of a passenger placed at his request and with their assent in the carriage in which he is to travel, and that such an entire absence of liability is unreasonable, and therefore the only reasonable conclusion is to imply a common carrier's liability. But, in our opinion, it can not properly be said that the company, if not liable as common carriers, incur no liability. The company undertake to carry the passenger; they equally undertake to carry his goods, which, with their consent, are placed with him in the carriage in which he is. And they are not gratuitous bailees of those goods, as they receive them into their carriages in consideration of the passenger paying his fare. The company therefore, must, according to ordinary principles, be held liable for the loss or injury caused by their negligence in respect of those goods as bailees for hire and contractors to carry. The company have in fact the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself. This is our view on principle. It remains for us to consider the decisions bearing on this question. *Cohen vs. South-Eastern Railway Co.* (L. R., 1 Ex. Div. 217), is the only case cited which came before a court of error. The question in that case was not as to luggage carried by the passenger in the carriage with him; and all that the court decided was that the company were liable for the loss of passenger's luggage carried in the same train but not in the same carriage with him, when occasioned by the negligence of the servants of the company. The plaintiff also relies on *Robinson vs. Dunmore*. The decision in that case is not in point; for the defendant had expressly contracted that the goods

should be safely carried, and the court held that he was not relieved from this contract by the fact of the plaintiff sending his servant with the defendant. It is true that CHAMBRE, J., in giving judgment, stated that it had been held that a coach proprietor is liable as a common carrier for a passenger's luggage, though placed under the eye of the passenger. But in such a case it is obvious that the servants of the coach proprietor did, although the passenger was on the coach, retain an absolute control over the goods in question just as much as if the passenger had not been there. The cases of *Le Conte* vs. *London and South-Western Railway Co.* (13 L. T. Rep. N. S. 325); *Butcher* vs. *London and South-Western Railway Co.* (16 C. B. 13); and *Richards* vs. *London, Brighton and South Coast Railway Co.* (7 C. B. 839), may with more reason be relied on for the plaintiff. These were all cases where the claim against the company was for the loss of articles placed by or at the wish of a passenger in the carriage in which he traveled, or intended to travel. In the first case, though judges to whose opinion great weight is due expressed themselves in terms which favor the contention that the company are liable, the decision was on other grounds in favor of the company, and the opinion expressed by the judges may be explained as suggested by WILES, J., in *Talley* vs. *Great Western Railway Co.* (L. R., 6 C. P. 44). In the other cases of *Butcher* vs. *London and South-Western Railway Co.*, and *Richards* vs. *London, Brighton and South Coast Railway Co.*, the judgments were against the defendants, and were certainly, as it would seem, based on the view that the company in each case were liable as common carriers. In *Butcher* vs. *London and South-Western Railway Co.*, however, there was some evidence of negligence on the part of the company. And neither of these cases was before the court of error. Moreover, in the latter case of *Talley* vs. *Great Western Railway Co.*, the Court of Common Pleas decided that the defendant company were not liable for the loss of a portmanteau placed at the passenger's request in the carriage with him. In that case the jury had found the plaintiff guilty of negligence, but it was apparently only in

neglecting to get back into the carriage in which his portmanteau had been placed. In that case WILES, J., who delivered the judgment of the court, pointed out the distinctions of fact which exist between luggage carried in the ordinary luggage van under the immediate control of the company, and articles placed by the passenger, or at his request, in the carriage wherein he is to travel, and showed that his opinion was that the company are not liable as absolute owners of articles so placed, but are only liable in event of negligence in some part of the duty which pertained to them. Under these circumstances we are of opinion that this court is not bound by the authorities to decide that the company are liable, if in our opinion the company can not on principle be held to have undertaken the liability of common carriers in respect of the plaintiff's bag, that is, to have contracted to become insurers of it. For the reason above stated we are of opinion that they did not so contract, and that the judgment in favor of the company should be affirmed. Judgment affirmed.

Recent Bankruptcy Decisions.

COMPOSITION.

(1) *Objections interposed by minority.*—In composition proceedings, when objections are interposed by the minority whose claims will be discharged against their will, it is the duty of the court to examine those objections fully and carefully. U. S. Dist. Ct., S. D. Illinois. *In re Keiler* (18 Nat. Bankr. Reg. 36).

(2) *Deceit a ground for interference.*—The court will not hesitate to interfere when the debtor has deceived the creditors into a vote which they would not have given had the facts been honestly and fairly before them; nor to withhold its assent to the composition, if it is satisfied that the proceedings are collusive, although there is only one dissenting

creditor. But the court must act on evidence, not suspicion. Ib.

(3) *When composition confirmed.*—Where it appears that the creditors can receive no more than the amount proposed if ordinary administration be had, and there is no adequate proof of collusion, the composition should be confirmed. Ib.

CONTRACT.

Consideration: when contract completed.—An arrangement was entered into between defendant and a committee appointed by the bankrupt corporation, defendant, and the other owners, by which defendant was to furnish the lumber necessary to rebuild a dam owned by them all. Defendant furnished a part of the lumber, placing it where it would be taken for use on his own land, but the dam was not rebuilt. Defendant proved his claim in the bankruptcy proceedings for the bankrupt's share of the purchase price, but afterward withdrew it, and neither the bankrupt nor its assignee ever paid anything for the lumber thus furnished or otherwise took possession of it. Subsequently defendant obtained leave of the assignee to sell it, and promised thereupon to pay him his share of the avails; but after selling the same he refused, on demand made, to pay over plaintiff's share. In an action by the assignee to recover such share as money had and received to his use, *held*: that it was proper to submit to the jury the question whether anything remained to be done to this lumber by defendant before, under the contract, it was to be taken and used; that the question whether the title to the lumber passed to the bankrupt, and, therefore, whether there was a consideration for defendant's promise depended upon whether anything remained to be done by the seller. U. S. Circ. Ct., Vermont. *Gates vs. Winooski Lumber Co.* (18 Nat. Bankr. Reg. 31).

LEASE.

Assignee of tenant does not become assignee of.—While an assignee is bound to pay a reasonable compensation for the use of premises occupied by him in winding up the estate, he does not, by accepting the trust, become the assignee of

leases belonging to the bankrupt, or bound to pay the rent reserved. To entitle the landlord to rent the occupation of the assignee must be not merely technical, but substantial and beneficial to the estate. U. S. Dist. Ct., E. D. Michigan. *In re Ives* (18 Nat. Bankr. Reg. 28).

NATIONAL BANK.

(1) *When action for conversion against, not maintainable.*—The bankrupt B. held certain shares of stock of the defendant, a national bank. The bank claimed a lien on such stock, under its by-laws, to secure an indebtedness due it from the bankrupts. This by-law, the assignee claimed, was void under the National Banking Law, and upon refusal of the bank to give him, as assignee, a certificate for these shares, brought action for their value. *Held*: that a judgment for conversion vests the title to the converted property in the wrong-doer, and the wrong-doer in this case can not hold the title, the assignee can not maintain the action in this form. U. S. Dist. Ct., E. D. Missouri. *Meyers vs. Valley National Bank* (18 Nat. Bankr. Reg. 34).

(2) *Unlawful contract by: purchase of its own stock.*—The bank purchased a quantity of its stock on the market, and not having a right to hold it in its own name, divided it among some of the directors. The bankrupt B., who was one of the directors, took some of this stock and gave his note therefor, the bank retaining the certificate for him, although the stock was transferred to him on the books, and he received dividends thereon. On his failure the bank caused him to transfer the stock to its teller, but retained the note as an asset. In an action by the assignee to set aside the transfer as a preference, *held*: that the bank had lawfully no stock to convey, and that B. was not the lawful owner. Ib.

Recent Decisions.

Common Carrier—Bill of Lading—Exemption.—1. Cotton was shipped by a railroad company, and after its delivery, but before the cotton had started on its destination, a bill of lading was given which exempted the carrier from loss by fire. Insurance was effected by the shipper, and the bill of lading delivered to the insurer. *Held:* in an action by the insurer against the carrier, that the plaintiff was subject to any defense that would be available against the shipper; and in the absence of negligence the bill of lading exempted the carrier from liability. 2. The bill of lading having been accepted without objection, was the contract, and the shipper could not resort to an alleged prior oral agreement; he was bound to know its contents. To make the case out of this rule, it would be necessary to show that the goods had passed beyond the shipper's control before the bill of lading was delivered.—*Germania Fire Ins. Co. vs. Memphis and Charleston Railroad.* (Court of Appeals of New York, 7 Ins. L. J. 547.) Opinion by RAPALLO, J.

Negligence—Master and servant—Mining operations—Fellow Servants.—1. In order to bring a case within the rule that a master is not responsible for any injury happening to a servant through the negligence of a fellow servant, it is not necessary that the injured and the negligent servants should be engaged in the same particular work; it is sufficient if the general scope of their employment be the same. 2. A "driver boss" was killed in a coal mine, by an explosion caused by the negligence (if any negligence there was) of the "mining boss," who had given an order to reduce the supply of fresh air. *Held:* that the two were fellow servants within the meaning of the rule, and that the owner of the mine was not responsible. 3. To prove contributory negligence, testimony is admissible to show that the deceased, at the time of his death, was in a position which he had been warned, and himself had warned others, was dangerous. (*Mullen vs. Steamship Co.*, 28 Sm. 25, 1 W. N. 218, explained.)—*Lehigh Valley Coal Co. vs. Jones.* (Supreme Court of Pennsylvania, 5 W. M. 436.)

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Current Topics.

By the Constitution of the State the County Court has appellate jurisdiction in all cases arising in the Justices' Court and any other inferior courts that may be established by the Legislature. The crowded docket of the County Court induced an effort to establish some court, or courts, for its relief, and by an act of the last Legislature the Municipal Court of Appeals was created, to which all the cases before the County Court of this county which had been appealed from the Justices' Court were transferred, and jurisdiction given in all cases to be appealed from Justices' Courts. The State Printer, in publishing the Constitution of the State in connection with the acts of the session of 1877-8, omitted from Section 8, Article 7, the clause giving jurisdiction in appeal cases to the County Court. The Legislature can not go beyond the limits of the Constitution, nor can the State Printer amend the Constitution, so we anticipate an early attack on the constitutionality of the act creating the Municipal Court of Appeals.

THE Hastings Law Department of the University of California was fully inaugurated on Thursday last. Professor Pomeroy's address was able and instructive, setting forth fully and clearly the objects of the school, the course and method of instruction, and the great benefits to be derived from such training.

The address was listened to with great interest by a large body of the legal profession, including the Justices of the

Supreme Court, Judges of the District and County Courts, and the leading members of the bar of this city.

The method of instruction is a departure from the generally adopted plan, being more practical than theoretical. The workings of this method and its results will be watched with great interest throughout the Union.

About one hundred students have been enrolled and will be examined as soon as practicable. Each student is compelled to furnish, from some lawyer in good standing, a certificate of unblemished character.

We publish elsewhere the course and method of instruction.

No opinions of our Supreme Court have been filed within the last two weeks. The court, however, is hard at work, and we may expect them soon.

INDICTMENT FOR SELLING LAND TWICE.

The People vs. John W. Pearson and Allie M. Pearson.

This case has attracted considerable attention, and is important, as being the first case under a new statute, Section 533 of the Penal Code. In *People vs. Gurnett* (35 Cal. R. p. 475), the former statute (Hittell's Digest, § 1532) was construed and commented upon, and since that decision the words "willfully and with intent to defraud, previous or subsequent purchasers" have been added. The statute now thus reads: 533. Every person, who after selling, bartering, or disposing of any tract of land or town lot, or after executing any bond or agreement for the sale of any land or town lots, again willfully and with intent to defraud, previous or subsequent purchasers, sells, barter or disposes of the same tract of land, or town lot, or any part thereof * * * * is punishable, etc. In Alameda County, the Grand Jury found an indictment against John W. and Allie M. Pearson, his

wife, for selling land twice, with intent to defraud a previous purchaser. The defendants demanded separate trials, and John W. Pearson was first tried. No evidence was offered to prove whether John W. or Allie M. Pearson originally held the title. The proof adduced was, first, a deed dated 10th July, 1877, from John W. Pearson and Allie M. Pearson, to one Gray, by which for \$7,200 they granted, bargained, and sold to Gray all the lot of land in Oakland, describing it; second, a deed, dated 13th September, 1877, from the same parties, of the same land to the California Trading Company, a corporation. Both deeds purported to grant the fee simple title. It was proved by parol that the California Trading Company was a corporation *de facto*, and that in consideration of Pearson's said deed to it, of this and other property, he received a number of shares of stock of the corporation, but that in the valuation, there was a small value attached to the property deeded to Gray. It was also proven that J. W. Pearson had several times stated that he intended to beat Gray out of his purchase. It was further proved, and upon this evidence the case was made to turn, that at the time of Gray's purchase he executed to Allie M. Pearson a contract, which was not executed by her, by which Gray, in consideration of one dollar, agreed to sell to Allie M. Pearson the same land above mentioned, for \$7,200 and interest from date of agreement until paid, all to be paid on the 1st day of January, 1878, and on receiving said price he would execute to her a deed of the same title he had previously received from Pearson and wife. Gray was to have and to retain possession of the land and collect rents, and in case of reconveyance, to account for the balance of rents after paying for insurance, assessments, and care of property. The payment of the price was made a condition precedent to said conveyance, and time was the essence of the contract. There was no agreement by Allie M. Pearson to purchase the land, nor did she sign with Gray.

It was offered to prove, but objected to and objection sustained, that Allie M. Pearson had made a third deed, of one-third of the same land to one Crittenden, and the latter with

Allie M. Pearson had brought their action against Gray in the District Court to set aside the said deed of Pearson and wife to him as void, filing a complaint sworn to by Allie M. Pearson alleging that she never acknowledged the deed to Gray. It did not appear otherwise but that Gray's deed was a good and valid conveyance.

The District Attorney, Vrooman, declining to offer further testimony, Judge Nye of the County Court, in which the case was being tried, directed the jury to render a verdict for the defendant, which was done, and the defendant discharged.

The point made by the counsel for the defendant was:

That the first conveyance to Gray, although absolute on its face, was, when taken in connection with Gray's agreement with Allie M. Pearson, in fact a mortgage, and therefore there was no fraud in the second conveyance by Pearson and wife to the California Trading Company; and further, the deed to Gray being valid, he could not be defrauded by a subsequent deed executed by Pearson and wife.

THE HASTINGS LAW DEPARTMENT OF THE UNIVERSITY OF CALIFORNIA.

The Course and Method of Instruction.

The complete course extends through three academic years. When the school is fully organized it will consist of three classes—the junior, the middle, and the senior—and a separate course of study and instruction will be given to each class by itself.

During these three years it is designed to present the entire body of the law, especially adapted to the Pacific States and Territories, in a progressive, rational, and scientific, as well as practical, order; and to adopt modes of instruction which will develop the student's own power, throw him upon his own resources, aid him in acquiring habits of ap-

plication, and train him to investigate, think, and act for himself.

JUNIOR YEAR.

During the first, or junior year, the main departments of the law will be presented in their general principles and outlines. The instruction will chiefly be given by means of text-books, definite portions being assigned to the class for preliminary study, and by means of oral recitations, examinations, and discussions upon these subjects conducted by the professor in charge. In addition, however, to the text-book used for study and recitation, the class will be advised to read portions of other works and leading cases, in which the particular subject matter under consideration is treated more fully. Constant reference will also be made to statutory legislation.

Two parallel courses of study will be pursued throughout the junior year, and the public exercises of the class thereon will alternate.

The year will open with a few lectures upon the nature of law, its subject matter, its divisions, and the three principles upon which its subject matter should be classified. The two courses of study will then commence and be pursued through the year as follows:

FIRST COURSE. I.—*The law as to persons*, including the absolute rights belonging to all persons; the status and classes of persons, the domestic relations, etc. *Text-book*: Kent's Commentaries, lectures 24 to 32. Works for collateral reading will be announced to the class.

II.—*The law as to personal property*, including its kinds, its mode of acquisition, transfer, etc. *Text-book*: Kent's Commentaries, lectures 35 to 38.

III.—The outlines and general doctrines of the *law as to contracts*, including the doctrines and rules which concern contracts generally, with the general principles of the most important mercantile contracts. *Text-books*: Metcalf on Contracts, Parsons on Contracts, Kent's Commentaries, the lectures upon various mercantile contracts.

SECOND COURSE. *The law as to real property*, including the origin and history of real property law, and the doctrines and rules with respect to all its branches and departments, except remainders, uses and trusts, powers, and certain equitable estates. *Text-book*: Blackstone's Commentaries, second book; Washburne on Real Property, with constant reference to the Statutes of California and other States.

MIDDLE YEAR.

In the second, or middle year, the departments of the law which form the subject matter of the course are, in the main, more advanced and practical than in the first year, while the study and instruction are more detailed. The mode of instruction adopted is especially fitted to throw the student upon his own resources, to give him habits of independent and careful examination, and to accustom him to legal processes of thought and investigation. Having now attained an outline of the general principles of the law, the student is no longer confined to a particular text-book, nor definite lessons. In taking up each branch or department (*e. g.* corporations, agency, wills, etc.,) the class will be furnished with a syllabus of the lectures upon that subject. This syllabus gives in detail the topics and points to be discussed in each lecture, the doctrines and principles to be investigated, the various text-books with the chapters or sections where these questions are treated. It also cites the leading cases, English and American, in which the principles have been announced, and the subsequent important cases in which these principles and doctrines have been extended, limited, modified, explained, etc. The student is expected to pursue his investigation by the aid of this syllabus, to read some one or more of the treatises indicated, and especially to examine and study the cases which are cited. In this manner he prepares himself for the oral discussion of the professor in charge, which is based upon the outline contained in the syllabus. This oral discussion is not a formal lecture. It will aim at bringing out a full and

free inquiry from the members of the class, and will consist of examinations, illustrations, questions, and answers, and every other means of testing the amount and accuracy of the student's knowledge, and of promoting a spirit of close and careful inquiry.

Among the topics which will form the course during this year are the following, subject, however, to whatever modification may be found expedient, viz.: A full course of mercantile and commercial law, embracing corporations, agency, partnership, sale, bailments, bills and notes, insurance, shipping contracts, suretyship, etc. Also, certain advanced topics of real property law—namely: remainders, uses and trusts, and powers. Also, the law as to last wills and testaments, and the administration of the estates of deceased persons. Also, the important heads of equity jurisprudence, so far as they have not been studied in the junior year.

Throughout the whole year constant reference will be made to statutes concerning the subjects under consideration.

SENIOR YEAR.

The mode of study and instruction with reference to subjects of practical character will be the same as that pursued in the second year. With reference to other subjects, which are somewhat collateral to the regular course, the instruction will be given by lectures, either written or oral.

The important branches which form the course for this year, subject to such modifications as may be found expedient, are the following:

Pleading and practice according to the reformed system of procedure, accompanied, however, by instruction in the general theory of the common law forms of action, and of common law and equity pleading, the law of evidence, constitutional law of the United States, and of the States, criminal law, admiralty law, patent law.

Lectures will also be given upon medical jurisprudence. The principles and rules of morality in their connection

with the law, and in their application to the practice of the law, public and private international law, the Roman law, general jurisprudence considered in its history and its philosophy, the jurisprudence of different countries compared.

Lectures upon those and other special topics collateral to the regular course will be given by gentlemen of the highest ability and reputation on the bench, at the bar, and in other professions, who are not members of the law faculty.

MOOT COURTS, ETC.

A moot court will be established for the argument of cases and the discussion of legal questions by members of all the classes. It is intended to give great prominence to this method of supplementing the formal course of instruction. Records of actual causes pending in the courts of the State will be obtained and furnished to the students for examination and argument. It is hoped that the students will also form debating societies or clubs for their own mutual improvement. During the senior year the class will have constant exercises in the preparation of pleadings and all other papers which may be used in an action, and in the drawing of all kinds of legal documents.

Land Decision.

DUDYMOTT vs. KANSAS PACIFIC RAILROAD CO.

HELD:—That all lands of said company not sold or disposed of within three years from the date of the completion of the road, are subject to pre-emption at \$1.25 per acre.

DEPARTMENT OF INTERIOR, }
Washington, D. C., July 23, 1878. }

SIR:—I have considered the appeal of Nelson Dudymott, by his attorney, M. Mullins, Esq., from your decision of October 12th, 1877, approving the action of the local officers in rejecting the application of said Dudymott to file a D. S.

upon the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ Lot No. 7, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ sec. 7, T. 11 S. R. 5 E., Salina Land District, Kansas, for the reason that the land applied for is within the limits of the grant to the Kansas Pacific Railroad Company.

Mr. Dudymott claims the right to pre-empt said tract of land under the provisions of an Act of Congress approved September 4th, 1841, and the last clause of the 3d section of an Act of Congress approved July 1st, 1862.

The reasons assigned in your decision for approving the action of the local officers are stated as follows:

"On February 21st, 1873, this office, in a letter to the Register and Receiver at Cheyenne, Wyoming Territory, in the matter of an application by Henry Garlanatti to enter certain lands under the proviso in question, said: 'In my letter to you of the 21st of June last, * * I stated that the 3d section of the Act of July 1st, 1862, provides that the lands inuring to said company within the granted limits which shall remain undisposed of by said company at the expiration of three years from the final completion of the road, shall be sold by said company to settlers, by pre-emption, at \$1.25 per acre. I will now state in addition, that the law does not provide for the enforcement of said proviso by this office; and should this office attempt to dispose of the land in question, all moneys so received, in accordance with existing laws, would have to be turned into the United States Treasury, and it would require a special Act of Congress to withdraw the same and pay it to the railroad company.'

"'Nor are the usual fees allowed to the district land officers in acting on pre-emption cases provided for in the Act. In my opinion, therefore, said proviso is a condition running with the grant, and entirely beyond the jurisdiction of this office. I accordingly approve your action in rejecting Mr. Garlanatti's application' * * *."

You further state, that "an appeal having been taken from the above decision, the Acting Secretary of the Interior, Mr. Cowan, on September 15th, 1873, affirmed the rejection of the application for other reasons appearing in the case, but declined to pass upon the question raised under the provis-

ions of the 3d section, until it is presented in a case where its decision becomes necessary. * * For the reasons stated in the decision of my predecessor—herein quoted—and in the absence of any decision by the courts or the Department to the contrary, I decide that the matter of the disposition of lands in the condition of the tracts involved in the application on hand, is not within the jurisdiction or control of this office."

From this decision Mr. Dudymott, by his attorney, filed an appeal alleging, among others, the following exceptions, viz.:

"First: Because § 3d of the Act of Congress of July 1st, 1862, which gave alternate sections of land on each side of the road to the Kansas Pacific Railroad Company—formerly the Leavenworth, Pawnee and Western Railroad Company—contained a provision that any of these lands not sold by said company within three years after the final completion of the road, should be sold to actual settlers under the pre-emption laws at \$1.25 per acre, the money to be paid to the company.

"Second: Because said railroad was accepted by the government as complete in the latter part of the year 1872, or nearly five years ago, and therefore the land above described, being a part of said grant, and still unsold by said company, is now, and should have been for nearly two years past, open to pre-emption settlement."

The 3d section of the Act making the grant to aid in the construction of the road of which the Kansas Pacific Railroad Company is the successor, reads as follows:

"Section 3. *And be it further enacted*, that there be, and hereby is, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, and munitions of war, and public stores thereon, and every alternate section of public lands designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not

sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed, *Provided*, that all mineral lands shall be excepted from the operations of this Act; but when the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." (11 Stat. p. 489.)

By an Act of Congress approved July 2d, 1864, said grant was increased to ten sections per mile on each side of said road, and the limits within which the same were to be selected to twenty miles on each side thereof. (13 Stat. p. 356, § 4.)

This road was completed within the time limited in the grant, and the last section thereof accepted by the President October 19th, 1872. The proofs submitted do not show conclusively that Mr. Dudymott is a qualified pre-emptor; nor does it satisfactorily appear that the tracts described in his declaration statement have not been sold by said company. He alleges that he is a qualified pre-emptor, and has presented affidavits showing that said tracts had not been sold by said company at the date he filed his application therefor as a pre-emptor. Considering him to be qualified as a pre-emptor, and the lands at that time to have been unsold by the said company, the question is presented whether under the last clause of said 3d section his application should have been received; and if full compliance with the pre-emption law, including payment for the tracts, were shown, a patent therefor should issue to him by the United States.

Nearly all of the grants made by the United States to aid in the construction of railroads, and for other works of internal improvements, have had annexed to them conditions, some of which are conditions precedent, and others conditions subsequent, which conditions are found in the grant.

It can not be denied that Congress had the right to make a grant to said company absolute and unconditional, but in order to secure the objects for which this grant was made, conditions were annexed.

The company had the right to accept or reject the grant with the conditions therein made, but having accepted it, it is now estopped to deny their force and effect.

One of those conditions, and the one under which the applicant now claims the right to enter a portion of the land granted to said company, is that "all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

The object of including this condition in the grant is apparent. Referring to the objects to be attained by this provision, the Supreme Court, in the case of the *Railroad Company vs. Prescott* (16 Wall. p. —), said: "It is wisely provided that these lands shall not be used by the company as a monopoly of indefinite duration. The policy of the government has been, for years, to encourage settlement on the public lands by the pioneers of emigration, and to this end it has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who, by purchase, own adjacent lands, that *all of it* shall be open to settlement and cultivation. Looking to this policy, and to the very large quantity of lands granted by this Statute to a single corporation, Congress declared that if the company did not sell those lands within a time limited by the Act, they shall then, without further action of the company or Congress, be open to the actual settler under the same laws which govern the right of pre-emption on government lands, and at the same price. Any one who has ever lived in a community where large bodies of land are withheld from use or occupation, or from sale except at exorbitant prices, will recognize the value of this provision. It is made for the public good, as well as for the actual settler. To

permit these lands to pass under a title derived from the State for taxes, would certainly defeat this intent of Congress. It makes no difference in the force of the principle that the money paid by the settler goes to the company; the lands which the Act of Congress declares shall be open to pre-emption and sale are withdrawn from pre-emption and sale by a tax title and possession under it, and it is no answer to say that the company, which might have paid the large taxes, gets the price paid by the settler."

In a subsequent decision—*Railroad Company vs. McShane* (23 Wall. p. 461)—the Supreme Court, while holding that the grounds above set forth were untenable, and not sufficient reasons on which to deny the right of the State to tax the lands, if the company had in other respects fully complied with the law (and in that respect overruling its decision in the case above cited), said: "The road was completed and accepted by the President in May, 1869, and those lands have been subject to such pre-emption since three years from that date, if this right can be exercised by the settler without further legislation by Congress or action by the Interior Department. We do not now propose to decide whether any such legislation or other action is necessary, or whether any one having the proper qualification has the right to settle on these lands, and tendering to the company the dollar and a quarter per acre, enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the Department has taken or intends to take any steps to invite or aid the exercise of this right. It would seem that, if it exists, it would not be defeated by the issue of the patent to the company, and it may therefore remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an indefinite period of time."

While it is true that neither of said decisions clearly and distinctly define the right of the government in the disposal of said lands, still they clearly indicate the opinion of the court that such a right exists; and whether it be considered that the estate granted is a conditional estate, or an estate

with a conditional limitation, in either case I am of the opinion that it must be held that the condition runs with the grant, and is in effect a reservation of a power of sale in the government of the land granted to the company, which remained unsold by it at the expiration of three years after the entire road was completed, under the provisions of the pre-emption law. It is manifest, I think, that Congress did not intend to grant to said company so large a quantity of land to be held and sold by it at speculative prices; but desiring to give it aid and assistance in its undertaking, at the same time provided that the actual settler who was willing to pay the price stipulated should have the right to settle and make a home upon any of the lands so granted; and in order to secure this right to the settler, and at the same time secure to the company an adequate consideration for the lands, reserved the right of sale thereof after the road had been completed for three years.

This view is not inconsistent with the object to be attained in making the grant; that object was to aid a corporation in the construction of a work of national importance, which contemplated an expenditure of money beyond the resources of private individuals, and whether that aid should be given in lands which might be sold by the company to reimburse it for the expenditures made, or to be made, or whether the government should sell the lands at a stipulated price, and pay the proceeds arising therefrom to said company, was considered immaterial both by the government and the company that accepted the grant with the conditions.

The fact that said company so understood this grant is made evident by a circular issued by its Land Commissioner, dated May 12th, 1873, inviting purchasers of its lands, in which he says: "The road was accepted by the government as complete about six months ago. In three years from that time the unsold lands will be subject, we suppose, to the pre-emption laws, but we hope and expect to have all our lands sold before that time arrives. All railroad lands sold by this company are sold clear of taxes, with assurance of perfect title when paid for."

More than three years have elapsed since the completion of said road, and its acceptance by the President, at the time Mr. Dudymott filed his declaratory statement for the tracts in question. I am of the opinion that his application should have been received by the local officers, subject, however, to the condition that it be made to appear before final certificate issue to him, that at the time his declaratory statement was filed for said tracts said company had not sold or disposed of the same.

In your decision it is held "that the matter of the disposition of lands in the condition of the tracts involved in the application in hand is not within the jurisdiction or control of this office." If the views I have expressed in relation to the sale and disposal of said lands are correct, and I see no reason to doubt their correctness, the sale and disposal of lands in the condition of those applied for, if unsold at the time by said company, is clearly within the jurisdiction of your office "like other lands."

By the terms of the grant by which said lands, or the proceeds which shall arise from the sale thereof, inured to said company, it is provided that lands remaining unsold at the expiration of three years from the time when the entire road was completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre.

In other words, that said lands shall revert to the public domain for sale and disposal for said company, under the pre-emption laws of the United States. And whether it be considered that said lands are public lands in a general or special sense, can not, in my opinion, affect the jurisdiction of your office in making sale and disposal of the same.

At the time this grant was made the provisions of the pre-emption law were well understood, and in so far as said act provided that the lands granted shall be subject to settlement and pre-emption, like other lands, it must be considered that Congress intended that the same rules and regulations should be adopted in relation to the disposal and sale of said lands as are adopted in the sale of public lands under the pre-emption law.

While it may be true that further legislation in relation to the sale of said lands might have been advisable, still I do not think it to have been absolutely necessary, except to provide for the manner in which the proceeds which shall arise from the sale of said lands shall be paid to said company.

Counsel for the company suggests that these lands are covered by a mortgage executed by said company to secure moneys borrowed in the constructions of its road. If this be true, I am unable to perceive that said mortgage is any obstacle to the disposal of said lands in accordance with the provisions of the granting act. The company mortgaged such interest in the lands as it possessed, and the mortgagees must be considered to have taken the mortgage with full knowledge of the right of the company to make the same. Aside from these considerations, however, the provision in the mortgage which authorizes the company to sell and dispose of the lands granted, and make conveyance thereof to the purchasers, which conveyance shall release the right of the mortgagees to the particular tract, will in the same manner protect the pre-emptor who purchases of the government, which has authority to sell the lands and pay the proceeds arising from such sales to the company.

The local officers of each of the land districts in which lands inuring to said company by virtue of said grant are situated, should be instructed to receive filings conditionally for said lands, in tracts not exceeding one quarter section, by qualified pre-emptors; and on receipt of such declaratory statements, to call upon the company for a statement showing whether the lands applied have been sold by it; and if not sold, then the declaratory statements should be allowed, subject to the applicants showing full compliance with the pre-emption law.

If the company neglects or refuses to furnish such statements to the local officers within thirty (30) days after service of said notice, in that case they should be instructed to order a hearing, if so requested by the applicant, to determine whether such tract or tracts are subject to such filing, giv-

ing notice of the time and place, when and where such hearing will be held, in some newspaper published and circulated in the county where the lands are situated, notifying said company, and any and all persons if such there be claiming title to said tracts under it, to appear at the time and place mentioned, to show cause why said declaratory statements should not be received.

At such hearing the applicant should be required to show that he is an actual settler on the land applied for, a qualified pre-emptor, and that the records of the county where deeds and conveyances are recorded do not show that said tracts had been sold at the date of the filing of his declaratory statement; and the company, or its grantee, to show whether said tracts applied for have been sold by it.

If the company, or its grantee, fail or refuse to appear and offer any testimony, the filing should be allowed, under the rule that "when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party." (Green on Evidence, par. 79.)

In making returns of the moneys arising from the sale of said lands, the local officers should be instructed to keep a separate account of the lands sold, and the moneys received therefor on account of said company, in order that the same may be passed to its credit.

In this case, inasmuch as it does not satisfactorily appear whether the lands applied for had been sold by the company at the time Mr. Dudymott filed his declaratory statement, you will instruct the local officers to call upon said company for a statement showing whether said lands had been sold by it at that time, and if it refuse or neglect to furnish such statement within thirty (30) days after the service of said notice, that they order a hearing to determine that fact, under the rule above set forth.

For the reasons stated your decision is reversed, and the papers transmitted with your letter of January 7th, 1878, are herewith returned. C. SCHURZ, Secretary.

To the Commissioner of the General Land Office.

United States Supreme Court Abstract.

OCTOBER TERM, 1877.

CONFISCATION.

Alien giving aid to Confederacy not entitled to claim confiscated property under 12 Stat. 820.—Under the provision of the statute permitting one who had not given aid to the rebellion to claim the proceeds of cotton seized by the government in the Confederate States and sold during the war (12 Stat. 820), an alien who gave aid and comfort to the Confederate cause could not make claim. Judgment of Court of Claims affirmed. *Young, appellant vs. United States.* Opinion by WAITE, C. J.

CORPORATE BONDS.

Purchase of coupons in pursuance of contract with corporation not payment.—In pursuance of an arrangement with a railroad company whose road was mortgaged and the interest coupons of the mortgage bonds were about to fall due, the firm of D. S. & Co. caused its agents to purchase the coupons and transmit them uncanceled to the firm. *Held:* that the firm could enforce the coupons against the railroad; that the purchase for the firm did not amount to a payment, and that the firm acquired the rights of the original holders of the coupons by the purchase. Decree of U. S. Circuit Court, S. D. Alabama, affirmed. *Ketchum et al., appellants vs. Duncan et al.* Opinion by STRONG, J. Clifford, Swayne, Miller and Harlan, JJ., dissented.

CRIMINAL LAW.

1. *Intent—What knowingly and willfully implies.*—Doing or omitting to do a thing “knowingly and willfully” implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. Judgment of United States Circuit Court, Massachusetts, reversed. *Felton, plaintiff in error, vs. United States.* Opinion by FIELD, J.

2. *Presumption of knowledge from business—Distilling spirits.*—Parties engaged in distilling spirits are presumed to be acquainted with the utensils and machinery used in their business, and with their character and capacities. But the law does not attach culpability and impose punishment where there is no intention to evade its provisions, and the usual means to comply with them are adopted. Ib.

3. *What law requires.*—All that the law requires of them to avoid its penalties is to use in good faith the ordinary means—by the employment of skilled artisans and competent inspectors—to secure utensils and machinery which will accomplish the end desired. If, then, defects should exist, and the end sought be not attained, or defects in the utensils or machinery not then open to observation should subsequently be discovered, the parties are not chargeable with “knowingly and willfully” omitting to do what is required of them. Ib.

EIGHT - HOUR LAW.

1. *Federal statute does not apply to employee of contractor with government—Privity of contract.*—By a contract between O. and the United States, O. agreed to furnish the United States, from certain quarries, granite, to be delivered at Washington, D. C., to be paid for at specified prices, and to furnish the labor, tools, and materials necessary to cut, dress, and box the granite at the quarries in such manner as should be directed, the United States agreeing to pay the full cost of said labor, tools, and materials, etc., and fifteen per cent. addition. A time of delivery was specified, and O. was to forfeit, in case of default, \$100 per day for each day thereafter until delivery. Appellee was employed by O. on the work done under this contract, and was paid at the rate of ten hours per day. *Held:* that there was no privity between appellee and the United States, and he did not work for it and could not, on a claim that he should be paid at the rate of eight hours per day, maintain an action for additional compensation from the United States. Judgment of Court of Claims reversed. *United States, appellant, vs. Driscoll.* Opinion by SWAYNE, J.

MARITIME LAW.

1. *Bottomry bond*—*May be given upon cargo.*—The master of a bark, loaded with sugar, and which had become disabled in a foreign port, in order to procure funds for necessary repairs, executed a bottomry bond upon the bark, cargo, and freight. The cargo was insured by the D. Company. On the voyage home the bark was wrecked, but a part of the cargo saved. The D. Company paid the insurance, and the owners of the cargo assigned to the company all their interest in the cargo. In an action by the company against the agent of the bondholder to recover the proceeds of the cargo which had been taken possession of and sold by him, *held*: that the master had power to hypothecate the cargo, as well as the ship and freight, to enable him to prosecute his voyage, and the agent was entitled to retain the proceeds of the cargo and apply them toward the bond. Judgment of United States Circuit Court, Massachusetts, affirmed. *Delaware Mutual Safety Insurance Co., plaintiff in error, vs. Gossler.* Opinion by CLIFFORD, J.

2. *Discharge of loan by utter loss of vessel*—*What constitutes utter loss.*—The bottomry bond contained a provision discharging the borrowers from liability in case of the “utter loss” of the vessel by the perils of the sea. The vessel was cast ashore, and after being surveyed and found incapable of being repaired, was broken up and the pieces sold. *Held*: not an “utter loss” within the meaning of the provision. Ib.

Pacific Coast Law Journal.

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No. 25.

Send your numbers and \$1 25, and we will return the volume bound in law sheep, free of charge for postage. If you desire the volume returned at the earliest moment, send us the twenty-five numbers already furnished you, and we will add the Index Number, and bind all together.

Current Topics.

WE publish elsewhere all the cases that have been disposed of by the Supreme Court, not otherwise reported in the JOURNAL, since the close of our last volume, February 28, 1878. No opinions were written in these cases. We selected such of the cases in which no opinions were filed as presented by the record some positive and certain issue from which we could deduce a principle announced by the court by the affirmance or reversal of the judgment below. To have stated a controlling principle as governing the court in all these cases would have been impossible. It would have been unjust to the court and misleading to the profession. The present volume of the JOURNAL, therefore, contains all the written decisions, full notes presenting the exact issues, and the judgment of the court thereon in a large number of the cases where no opinions were filed, and a complete list of all the cases not otherwise reported, since the close of our last volume.

WE begin the publication of the Nevada Supreme Court decisions in the first number of our next volume. These opinions will be of much value to our subscribers in this State and Arizona, and make our JOURNAL indispensable to the attorneys of Nevada.

Supreme Court of California.

JULY TERM.

[No. 5,743.]

[Filed August 12, 1878.]

CAVE ET AL., RESPONDENTS, VS. CRAFTS ET AL., APPELLANTS.

PRACTICE—BAR.—Even if the same subject matter were involved in a former action, the judgment in that action must be pleaded as a former determination.

ADVERSE USE.—The use must be open, and as of right, and also peaceable; the slightest act that operates as an interruption by the owners prevents the acquisition of a right by such use.

RIPARIAN OWNERS—PUBLIC LANDS—ACT OF CONGRESS OF JULY 26, 1866.—

When waters have been appropriated for agricultural purposes from a natural stream through artificial conduits over the public lands, prior to a purchase from the Government of public lands, such rights, initiated and maintained by appropriation, were confirmed by the Act of Congress granting the right of way to ditch and canal owners over the public lands.

GRANT—APPURTEANCES—EASEMENTS.—When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants in the form which it assumes at the time he transfers it. The incident goes with the principal thing. The idea and definition to an easement to real estate granted is a privilege off and beyond the local boundaries of the lands or tenement conveyed. The word "appurtenances" is not necessary to the conveyance of an easement.

TRESPASS.—An averment of an easement will support an action for trespass.

PRACTICE—DENIAL.—Where the court below tried the cause upon the assumption that all the material allegations were denied, the insufficiency of a denial will not be heard in the Supreme Court.

Appeal from the Eighteenth District Court, San Bernardino County.

The complaint in this case alleges that the plaintiffs were the owners of a certain water ditch, and water rights extending from the south bank of Mill Creek, through plaintiffs' farms, and that they have the exclusive right to direct water from said Mill Creek for agricultural and irrigating purposes.

That they have held and possessed said ditch continuously since 1853 to the present time, except as to the defendant Crafts, who now owns the right to the use of the whole flow

of said creek from the hour of 3 P. M. to 9 P. M. on Tuesdays and Fridays of each week.

The complaint further states the different rights of each plaintiff, and alleges that the defendants, since 1875, have diverted the waters of said stream without right or consent, and prays an injunction.

The defendants, Leffingwell and Byrne, in their answer, deny all the allegations of the complaint; and for cross-complaint, allege twenty years continual uninterrupted possession; and that the plaintiffs and Crafts are estopped by a decree (September 21, 1864) of the First District Court, in the case of *Barton et al. vs. Willis et al.*, from any interference with the rights of defendants.

The plaintiffs filed an amended complaint, alleging that in the case of *Folks et al. vs. Crafts*, on 20th of June, 1871, it was decreed that the plaintiffs (who were the grantors of plaintiffs in this action) were the owners of the right to all the flow of water in said stream for five days in each week, from 3 to 9 P. M., and the defendant Crafts for two days in each week, from 3 to 9 P. M. The plaintiffs denied the cross-complaint of Leffingwell and Byrne.

The defendant Crafts, in his amended answer, says that the decree had no reference to his rights to the use of water, except as to the water he was owner of for using on his farm, called the "Crafts place;" that in addition he has the right to the flow of one-sixth of said stream from 3 to 9 P. M. of the other five days, by virtue of his ownership of a tract of land on said water course called the "Carpenter Ranch," and is entitled to the use of a reasonable flow of water for irrigating and domestic purposes for the "See" place and "Criswell" places, which he owns, by virtue of five years open, continuous, peaceably, and adverse use.

The court below found that the waters of said creek ran along what is called as "Mill Creek Wash," and not upon the lands of the plaintiffs or defendants.

That said waters had been diverted into the Mill Creek Zanja, and brought through said zanja to the "See," "Criswell," "Crafts," "Carpenter," and "Leffingwell" places, and

down to the lands known as "Cottonwood Row," and used for irrigation.

These tracts were confirmed to Jose del Carmen Lugo and others in 1865. The lands of "Cottonwood Row" passed from the original grantors long before any other.

That on the 23d day of June, 1870, in the Seventeenth District Court, in the case of *Crafts vs. McCoy*, Crafts was decreed to be entitled to the use of three-eighths of all the water running in said *zanja* each day for four hours.

That on March 20, 1871, in the suit of *Folks vs. Crafts*, it was decreed that the decree of June 23, 1870, be modified so as to allow said Crafts the water for two days each week, from 3 to 9 P. M.

The court below gave judgment for plaintiffs for costs, and perpetually enjoined defendant Crafts from diverting said waters except for household purposes and watering stock, and except between 3 and 9 o'clock P. M. on Tuesdays and Fridays of each week, and the defendants Byrne and Leffingwell are enjoined from diverting the water except for household purposes and watering stock, etc.

The remaining facts are stated in the opinion.

H. C. Rolfe and H. M. Willis, for appellants.

Waters, Swing & Boyer, for respondents.

McKINSTY, J.

There can be no doubt that the appellant, Crafts, is bound by the decree in *Folks et al. vs. Crafts*, so far as is concerned any claim on his part to the use of waters by reason of his one-sixth interest in the Carpenter ranch. Even if the same subject matter were involved in the prior action of *Crafts vs. McCoy*, the judgment in the prior action was not pleaded as a former determination in *Folks vs. Crafts*. But the issue was different. In *Folks vs. Crafts* the question was, What were the rights of the parties with respect to the use of certain waters *when that action was commenced?* *Crafts vs. McCoy* had been finally adjudged before Crafts acquired his one-sixth interest in the Carpenter ranch; and Crafts acquired the one-sixth interest prior to the commencement of the

action of *Folks vs. Crafts*. All the rights of Crafts in the waters of the stream, as they existed when the suit of *Folks vs. Crafts* was brought, were necessarily settled by the decree in that case, since they were, or could have been, there asserted.

Appellant Crafts claims the right to continue the use of water on the "See" and "Criswell" places by reason of *adverse use* for more than five years. It is enough to say that the use of water upon those places—as the case clearly shows—was not peaceable, as that term is applied in connection with the subject we are considering, but was disputed, and not infrequently interrupted by plaintiffs and their grantors. "The use," says Wood in his Law of Nuisances, "must also be open, and as of right, and also peaceable; for if there is any act done by the other owners that operates as an interruption, however slight, it prevents the acquisition of the right by such use." (9 Conn. 162; 1 M. and W. 100; 3 Nev. and Perry, 257.)

Appellant Crafts further claims that he is entitled to the use of water not allowed him by the decree of the District Court, as riparian proprietor, by virtue of his ownership of the "See" and "Criswell" tracts. His right to these two places were deraigned at the trial from McDonald and Meacham, who had acquired title thereto as pre-emptioners and purchasers from the United States. The purchase from the Government of the "See" place was consummated December 3, 1870, that of the "Criswell" tract on the 27th day of February, 1873. The court below found that the *zanja*—the waters of which are in dispute—was an artificial conduit through which the waters of the natural stream had been appropriated by plaintiffs and their grantors long prior to the purchase from the Government of the "See" and "Criswell" tracts. The rights thus initiated and maintained by appropriation were confirmed by the Act of Congress "granting the right of way to ditch and canal owners over the public lands." That act, passed July 26, 1866, conferred rights to waters appropriated for *agricultural* purposes. (*Basey vs. Gallagher*, 20 Wallace, 670.)

It appears from the findings, that prior to the grant to the Lugos of the rancho, which includes within its boundaries both the lands owned by the appellants, Leffingwell and Byrne, and those at Cottonwood Row, owned by plaintiffs, the Mission authorities (who were agents of the Spanish and Mexican governments) had conducted the waters from the natural stream to Cottonwood Row, and there employed them for purposes of irrigation; that this appropriation and use was continued by the Lugos until their conveyance to grantors of plaintiffs of lands at Cottonwood Row, and by plaintiffs or their grantors until after the purchase of the Lugos title by appellants, Leffingwell and Byrne.

Doubtless while the title of the whole rancho remained in the Lugos they might have diverted the waters of the *zanja* anywhere within the boundaries of the rancho. But the Lugos, having continued the exclusive appropriation to the lands at Cottonwood Row until the sale and conveyance of such lands, the question arises, did not the exclusive use of the waters attach as appurtenant to the lands at Cottonwood Row, in such sense, that neither the Lugos nor their grantees of lands on the *zanja* above could divert the waters or deprive the owners of Cottonwood Row of their accustomed use?

In *Lampman vs. Milks* (21 N. Y. 505), Denio, J., said: "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains. . . . No easement exists so long as the unity of possession remains, because the owner of the whole may at any time re-arrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale."

It has been said that the rule as adopted in *Nicholas vs.*

Chamberlain is recognized fully by the courts of this country. (Wood's Law of Nuisances, Sec. 415.) In that case (Cro. Jac. 121), it was laid down: "If one erects a house and builds a conduit thereto in another part of his lands, and conveys water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, the conduit and pipes pass with the house, because it is necessary, *et quasi*, appendant thereto."

When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. "If the grantor has already treated this portion as a separate property, the mode in which he enjoyed it, or suffered it to be enjoyed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it." (Phear on Waters, 73.)

There can be little doubt that throughout the entire possession of the Lugos the waters were conducted through the *zanja* to Cottonwood Row, and for purposes of irrigation. The use of these waters, to the extent, at least, to which they had been previously employed may have been, and, it is fair to presume, was the chief, perhaps only, inducement to the purchase by plaintiffs and their grantors. To authorize judicially the diversion and material reduction of the waters would be a violation of the principle that they took with all the apparent benefits and easements belonging to their purchase. And in cases like the present the purchaser is entitled to the benefit of the easement without any *express* reservation or grant. (*Pyer vs. Carter*, 1 H. & N. Exch., and Exch., Ch. 916.) The word "appurtenances" is not necessary to the conveyance of the easement. The general rule of law is, that when a party grants a thing, he by implication grants whatever is incident to it and necessary to its beneficial enjoyment. The incident goes with the principal thing. The idea and definition of an easement to real estate granted is, a privilege off and beyond the local boundaries of the

lands or tenament conveyed — in the present case, the privilege of conducting water through the lands retained by the Lugos, the common grantors of plaintiffs and defendants, by means of the *zanja*. (Angell on Water Courses, 153 a; 97 Mass. 133; 4 Gray, 379.) The parties at Cottonwood Row having acquired their lands with the use of water, by means of the *zanja* attached, and *quasi appurtenant* to them, no subsequent act of their grantor could divest them of their right.

It is claimed by appellants, that inasmuch as the plaintiffs have alleged in their complaint that they are owners of the ditch and have not averred that they are in possession of it, *trespass* can not be maintained. But the complaint also avers the existence of the easement. The court below found the existence of the easement only, and this will support the decree.

In the plaintiff's answer to the cross-complaint there is an attempted denial of the adverse use by defendants, Leffingwell and Byrne. The case was tried in the District Court upon the assumption that all the material allegations of the cross-complaint were denied. It has been repeatedly held by this court that under such circumstances the point that a denial was insufficient could not be made here.

Upon the question of adverse use, continuous and uninterrupted by appellants Leffingwell and Byrne, or by them and their grantors, for the period of five years, the District Court found against them. An examination of the transcript does not satisfy us that the finding was against the evidence.

Judgment and order affirmed.

We concur:

CROCKETT, J.

RHODES, J.

NILES, J.

[No. 5,830.]

[Filed August 12, 1878.]

PRESCOTT, APPELLANT, vs. SALTHOUSE, RESPONDENT.

PRACTICE—ATTORNEYS OF RECORD—WHO ARE—NOTICE.—An order associating a new attorney is unknown to the practice as prescribed by the Code of Civil Procedure. That Code provides only for the *substitution* of one attorney for another, either upon the consent of the superseded attorney, or upon the application of the client, after notice to the attorney of record. Even if an order associating a new attorney is to be regarded as operating a substitution it is ineffectual if written notice is not given to the adverse party. Nor can such attorney act as sole attorney of record under such an order.

Appeal from the Twentieth Judicial District, San Benito County.

The facts appear sufficiently in the opinion.

Julius Lee, for appellant.

Wm. Matthews, for respondent.

PER CURIAM.

Upon trial of this action judgment was rendered for the defendant. Subsequently Julius Lee, Esq., subscribing himself "Attorney for Plaintiff," served upon the attorney for the defendant a notice of intention to move for a new trial, and in due time thereafter presented to the judge who tried the case a proposed bill of exceptions in support of the motion for a new trial. The regularity of the service of the notice and presentation of the bill of exceptions were duly objected to by the attorney of the defendant, on the ground that Mr. Lee was not the attorney of record of the plaintiff, and was therefore not competent to give a notice or present a bill of exceptions in the cause. These objections were duly noted and preserved in the bill of exceptions sent up in the record. The court below denied the motion of the plaintiff for a new trial, and thereupon Mr. Lee, as attorney for the plaintiff, filed a notice of appeal from the judgment and order denying a new trial, and caused service thereof to be made upon the attorney for the respondent by the transmission of a copy through the post-office.

At the argument here the appeal from the judgment was

dismissed, because not brought within one year after the entry of the judgment below.

The counsel for the respondent insists that the appeal from the order denying a new trial must also be dismissed, because Mr. Lee, by whom the procedure on appeal is conducted, is not the plaintiff's attorney of record.

Mr. Lee certainly was not an attorney of record for the plaintiff at the commencement of the action, nor did he thereafter appear therein in anywise, previously to the trial. At the trial, however, an order of the court below was made as follows: "Ordered that Julius Lee be, and is, hereby associated as attorney of record with Messrs. Baggs & Tully for the plaintiff, etc." This order was made on the 5th day of August, 1875, and the clerk, having omitted to enter it in the minutes, it was subsequently and on August 8, 1876, entered therein, *nunc pro tunc*, as of the former day.

Such an order—that is an order *associating* a new attorney is unknown to the practice as prescribed by the Code of Civil Procedure. That Code provides for the *substitution* of one attorney for another, either upon the consent of the superseded attorney, or upon the application of the client, after notice to the attorney of record. (Code Civil Procedure, Sec. 284, *et seq.*) Upon such a change, made in either mode, *written notice* must be given to the adverse party, and until such *notice given*, the former attorney must be recognized. (Id. Sec. 285.) It follows, therefore, that even if the *nunc pro tunc* order is to be regarded as operating a substitution of Mr. Lee, it was ineffectual for want of the prescribed notice.

But as seen already, it was, in its very terms, merely an association of Mr. Lee with the attorneys of record for the plaintiff. It did not in any view purport to authorize him to act solely as the attorney for the plaintiff, but only in conjunction with the other attorneys for the plaintiff, who had not been superseded or removed.

The notice of intention to move for a new trial was, however, not given by Mr. Lee, as attorney for the plaintiff, associated with the other attorneys for the plaintiff, but as

sole attorney of record of the plaintiff—a position in which, as observed already, the *nunc pro tunc* order did not purport to place him.

If Mr. Lee desired to appear at the trial as counsel for the plaintiff, an order of the court was not necessary to enable him to do so.

We think, therefore, that the objections taken by the counsel for the respondent must prevail, and the appeal from the order denying a new trial must be dismissed; and it is so ordered.

Cases Decided Without Written Opinions,
AND NOT OTHERWISE REPORTED, SINCE THE BEGINNING OF
THE PRESENT VOLUME OF THE JOURNAL,
FEBRUARY 23, 1878.

- 5765—Zeinwaldt *vs.* Sacramento City R. R. Co., *ultra vires*.
- 5527—People *vs.* Union Lumber Association, *ultra vires*.
- 5119—Moulton *vs.* Parks, to restrain the building of a dam.
- 5783—Lewis *vs.* Foster, 16 and 36 Sections.
- 5670—Schatt *vs.* Odell, foreclosure.
- 5658—Clark *vs.* Jones, accounting.
- 5620—Wallace *vs.* Hanna, restitution.
- 5612—Estate of Goller, administration.
- 5612—Hellman *vs.* Gravel, administration.
- 5777—McClatchy *vs.* Sacramento County, to compel repayment of money.
- 5775—Williams *vs.* Williams, ejectment, married women.
- 5750—Stokes *vs.* O'Gier, trust.
- 5061—San Francisco *vs.* City Gas Co., Act of 1863.
- 4971—Wristen *vs.* Meyer, trover.
- 5420—Campbell *vs.* California Ins. Co., insurance policy.
- 5497—Santa Cruz R. R. Co. *vs.* Cox, judgment by consent.
- 10821—People *vs.* Barton.

10320—*People vs. Henderson & Sampson.*
5563—*Seale vs. Supervisors*, Act of April 4, 1870.
10289—*People vs. Atherton.*
4014—*Unger vs. Roper*, see opinion filed Nov. 6, 1877.
5733—*Wallace vs. Miller*, modified.
5574—*Strother vs. Diefendorff*, Jimeno grant.
5838—*Laidlau vs. French.*
5800—*Land and Loan Association vs. Stoneman.*
10340—*People vs. Thompson.*
10326—*People vs. Cowdry.*
10328—*People vs. Kelly.*
10329—*People vs. Moore.*
4389—*Kellogg vs. Rankin.*
6106—*Plummer vs. Alexander*, homestead.
6056—*Gharky vs. Werner*, will.
6091—*Sampson vs. Stickney*, lease.
6085—*Jackson vs. Stone*, water rights.
6004—*Austin vs. Austin*, divorce.
6041—*Reynolds vs. Groneville*, restitution.
5944—*Miller vs. Henderson*, to quiet title.
10348—*People vs. Bevans.*
10353—*People vs. Felix.*
10334—*People vs. Bailey.*
10347—*People vs. Fong Ah Tuck.*
10325—*People vs. Carrick.*
10344—*People vs. Butts.*
6065—*Robinson vs. Dwinelle*, writ of prohibition.
6009—*Bank of San Louis Obispo vs. Johnson*, foreclosure.
6034—*City of Stockton vs. Holden*, street assessment.
6026—*Cassner vs. Goldtree*, landlord and tenant.
5794—*Wiggins vs. McFarlane*, ejectment.
5782—*Kohlman vs. Hennessey*, administration.
5714—*Estate of Keenan*, administration.
5992—*Hook vs. Henderson*, suit on undertaking on appeal.
5946—*Estate of Weeks*, probate, homestead.
5929—*Clark vs. Tecopa S. M. Co.*, account.
5910—*Brown vs. Murray*, filing of statement for new trial.

5905—Beaudry *vs.* City of Los Angeles, street assessment.
5623—Rosenfeld *vs.* Reay, foreclosure.
5607—People *vs.* S. P. R. R. Co., wharfage.
5611—Rogers *vs.* Watson, foreclosure.
5604—The Union Savings Bank *vs.* Nolan, to declare a deed to be a mortgage.
5608—People *vs.* Hooper, wharfage.
5891—Pacific Mutual Life Ins. Co. *vs.* Brady, ejectment.
5803—Powers *vs.* Leith, to compel the execution of a deed.
5806—Harris *vs.* Walker, account.
5842—Prentice *vs.* Odd Fellows' Sav. and Com. Bank, lien lands.
5840—Wilson *vs.* Player, damages.
5856—St. John *vs.* Meyerstein, breach of contract.
5857—Burkhart *vs.* Meyerstein, breach of contract.
5876—Sanchez *vs.* Temple, to set aside mortgage.
5888—Botsford *vs.* Howell, swamp lands.
5894—Bascom *vs.* Davis, pre-emption.
5479—Hendley *vs.* Petch, to quiet title.
5465—Head *vs.* Bell, landlord and tenant.
5428—Flatt *vs.* Rohrle, restitution.
5426—Dyer *vs.* Brandenstein, street assessment.
5784—Swamp Land District *vs.* Feran, recl'm assessment.
5938—Burns *vs.* Miller, State lands.
10343—People *vs.* Satello and Acosta.
5566—Young *vs.* San Francisco.
5510—Ambrose *vs.* Roper.

In the following cases rehearings have been granted since March 1, 1878:

Shaw *vs.* Wandesforde, Onena *vs.* Dewlaney, People *vs.* Jones, City of Stockton *vs.* Reid, DeCelis *vs.* McClay, Vilhoe *vs.* S. & I. R. Co., Cruz *vs.* Martinez, Johnson *vs.* Hellman, Hall *vs.* McLea, People *vs.* Felton, Hager *vs.* Spect, Winter *vs.* Belmont Mining Co., Snow *vs.* Kimmer, Dowd *vs.* Clark (as to interest), Zeinwaldt *vs.* Sacramento City R. R. Co., Raisch *vs.* San Francisco County.

And denied in the following cases:

Green vs. Campbell, Marquard vs. Wheeler, Lincoln vs. Alexander, Harris vs. Supervisors, Ferrea vs. P. M. S. S. Co., Spring Valley Water Co. vs. Ashbury, Spring Valley Water Co. vs. San Francisco, Bellings vs. Drew, Brady vs. King, Seale vs. Supervisors, Thompson vs. Corpstein, Hershey vs. Dennis.

United States Circuit Court, District of Oregon.

JULY, 1878.

IN RE SPENSER.

1. **ADMISSION TO CITIZENSHIP—REQUISITES.**—An alien, to be entitled to admission to citizenship, must first prove that he has behaved as a man of good moral character during *all* the period of his residence in the United States.
2. **WHAT IS “GOOD MORAL CHARACTER”—PERJURY.**—What constitutes good moral character may vary in some respects in different times and places, but a person who commits perjury does not behave as a man of good moral character, and is not therefore entitled to admission to citizenship.
3. **A PARDON IS PROSPECTIVE AND NOT RETROACTIVE** in its operation, and while it absolves the offender from the guilt of his offense and relieves him from the legal disabilities consequent thereon, it does not obliterate or wipe out the fact of the commission of the crime, so that it can not be made to appear on an application to be admitted to citizenship.

DEADY, J.:

William Spenser, an alien, applies to “be admitted to become a citizen of the United States,” under Section 2165 of Revised Statutes. From the evidence it satisfactorily appears that he duly declared his intention, and has continuously resided in the United States—the State of Oregon—at least since 1870. He is, therefore, entitled to be admitted to citizenship, if it appear that during such residence “*he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed towards the good order and happiness of the same.*” (Sec. 2165 *supra*, Sub. 3.)

The proof shows that the applicant has resided in Oregon, near the Dalles, for more than eight years; that in 1876, and after he had declared his intention, he was duly convicted in the Circuit Court of the State for Wasco County, of the crime of perjury, committed by swearing falsely as a witness in a case in said court, in which he was a party, and sentenced to five years' imprisonment in the penitentiary; that after being in prison fifteen months and eight days, he was unqualifiedly pardoned by the Governor, upon, as the pardon recites, the petition of sundry citizens of Wasco County, and because it appeared that there were doubts as to his guilt, and unless he was released from prison there was danger that he would lose his homestead.

Upon this state of facts two questions arise: 1. Has the applicant "behaved as a man of good moral character" within the meaning of the statute; and 2, What is the effect of the pardon in this respect?

In the first place, during what time is the behavior of the applicant open to consideration? The statute—*supra*—declares: "It shall be made to appear to the satisfaction of the court admitting such alien, that he has resided within the United States five years at least, * * * and that *during that time* he has behaved as a man of good moral character," etc. Is an alien who has behaved as a man of good moral character during the five years immediately preceding his application, but who has not so behaved during his residence in the United States prior thereto, entitled to admission? I think not. The behavior of the applicant during *all* the time of his residence within the United States is material. The good of the country does not require, and it does not appear to be the policy of the law to promote the naturalization of aliens who have, at any time during their residence in the United States, behaved otherwise than as persons of good moral character. The citizenship of the country is sufficiently alloyed and debased by the presence of immoral natives, without the addition of those born in foreign countries.

The applicant must not simply have sustained a good rep-

utation, but his *conduct* must have been such as comports with a good *character*. In other words, he must have behaved—conducted himself—as a man of good moral character ordinarily would, should or does. *Character* consists of the qualities which constitute the individual; *reputation* the sum of opinions entertained concerning him. The former is interior, the latter external. The one is the substance, the other the shadow. (N. Y. P. Code, 120; 8 Barb. 603.)

What is “a good moral character” within the meaning of the statute may not be easy of determination in all cases. The standard may vary from one generation to another; and probably the average man of the country is as high as it can be set. In one age and country duelling, drinking and gambling are considered immoral, and in another they are regarded as very venial sins at most. The only authorities I have been able to find upon this subject, are the cases of *Ex parte* Douglas and *Ex parte* Sandberg, cited in 2 Bright, Fed. Dig. 25, from 5 West Jur. 171. These cases hold that an alien who lives in a state of polygamy, or believes that polygamy may be rightfully practiced, in defiance of the laws to the contrary, is not entitled to citizenship.

Upon general principles it would seem that whatever is forbidden by the law of the land ought to be considered for the time being immoral, within the purview of this statute. And it may be said with good reason that a person who violates the law thereby manifests, in a greater or less degree, that he is not “well disposed to the good order and happiness” of the country. *Good* behavior—that behavior for which a person reasonably suspected of an intention to misbehave, may be required to give surety, is defined to be the conduct authorized by law, and *bad* behavior such as the law punishes. (Bou. Dic. *verba*, Behavior; 2 Black, 251, 256.)

But perjury is not only *malum prohibitum*, but *malum in se*. At both the civil and common law it was classed among the *crimen falsi*, and wherever, as in this case, it affected the administration of justice, by introducing falsehood and fraud therein, it was, at common law, deemed infamous, and the person committing it held incompetent as a witness and unworthy of credit. (4 Saw. 213.)

There can be no question then, but that a person who commits perjury has so far behaved as a man of bad moral character. But it may be said that an alien who has otherwise behaved as a man of good moral character during a residence in the country of at least five years ought not to be denied admission to citizenship on account of the commission in that time of a *single* illegal or immoral act. This suggestion is based upon the idea that it is sufficient if the behavior of the applicant was generally good—that the good preponderated over the evil. In some sense this may be correct. For instance, the law of the State prohibits gaming and the unlicensed sale of spirituous liquors. These acts thereby become immoral. But their criminality consists in their being prohibited and not because they are deemed to be intrinsically wrong—*mala in se*. Now, if an applicant for naturalization, whose behavior, during a period of five or more years, was otherwise good, was shown to have committed during that time either of those or similar crimes, I am not prepared to say that his application ought to be denied on account of his behavior. And yet it is clear that anything like habitual gaming or vending of liquors under such circumstances would constitute bad behavior, immoral behavior, and be a bar under the statute to admission to citizenship. But in the case of murder, robbery, theft, bribery or perjury, it seems to me that a single instance of the commission of either of them is enough to prevent the admission. The burden of proof is upon the applicant to prove "to the satisfaction of the court" that during the period of his probation he has conducted himself as a moral man. But when the proof shows that he has committed an infamous crime, it is not possible in my judgment to find that his behavior has been such as to entitle him under the statute to receive the privilege and power of American citizenship.

What effect, if any, does the pardon have upon the application? By the Constitution of this State, Article V., § 14, the governor has power to grant pardons after conviction for all offenses, except treason, "subject to such regulations as may be prescribed by law." The criminal code makes no re-

strictions upon the power of the governor, except that he must first require the judge or district attorney who tried the case to give him a statement of the facts. (Or. G. C. c. 32.) This pardon does not show that this statement was asked for or obtained, nor does it appear therefrom what gave rise to the alleged doubts as to the defendant's guilt. So far then as this application is concerned the matter stands thus: The applicant was duly convicted of perjury, and the governor, in the exercise of that mercy which belongs to him in his official character, has pardoned him for reasons of his own that are immaterial to this inquiry.

The pardon is now produced by the applicant to show, not only that his crime has been forgiven him, but *that it never was*, and therefore it can not now be relied upon to prove that he has not behaved as a man of good moral character during his residence in the United States. In *Ex parte Garland* (4 Wall. 380), Mr. Justice FIELD, speaking for a majority of the court, says: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense." This is probably as strong and unqualified a statement of the scope and efficacy of a pardon as can be found in the books. And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and can not annihilate the established fact that he *was* guilty of the offense. And, such, I think, is the doctrine of the authorities cited in support of this opinion, namely: 4 Black. 402; 6 Bac. tit. Pardon H. Blackstone's language is: "The effect of such a pardon by the king is to make the offender *a new man*; to acquit him of all corporal penalties and forfeit-

ures annexed to that offense for which he obtained his pardon; and not so much to restore him to his former, as to give him a new credit and capacity." And the author goes on to state that a pardon does not purify the blood during the period it was corrupted by conviction, and gives the following illustration: "Yet if a person attainted receives the king's pardon and afterward hath a son, that son may be heir to his father, because the father being made a new man might transmit new inheritable blood; though had he been born *before the pardon he could never have inherited at all.*" Bacon says—a pardon makes the party "as it were a new man." It removes the punishment and "legal disabilities consequent on the crime." It restores his competency to be a witness, "but yet his credit must be left to the jury." From these authorities it is plain that a pardon does not operate retrospectively. The offender is purged of his guilt and *thenceforth* he is an innocent man, but the past is not obliterated, nor the fact that he *had* committed the crime wiped out.

Apply these principles to this case. By the commission of the crime the applicant was guilty of misbehavior within the meaning of the statute during his residence in the United States. The pardon has absolved him from the guilt of the act, and relieved him from the legal disabilities consequent thereupon. But it has not done away with the fact of his conviction. It does not operate retrospectively. The answer to the question, has he behaved as a man of good moral character, still must be in the negative; for the fact remains, notwithstanding the pardon, that the applicant was guilty of the crime of perjury—did behave otherwise than as a man of good moral character.

The fact that the applicant can not obtain title to his homestead unless he is admitted to citizenship can not affect the consideration of the question. Doubtless, in this respect, the matter operates as a hardship upon him. But this only illustrates the truth of the proverb—"the way of the transgressor is hard"—and in the long-run it is better for the world that it should be so.

The proof is not satisfactory that the applicant has behav-

ed as a man of good moral character during his residence in the United States, but the contrary; and, therefore, the application is denied. But the applicant having no counsel, and the matter having been submitted without argument, and being now *res judicata*, if he shall be hereafter advised that there is probable error in this ruling, he may apply within a reasonable time to set aside the judgment denying his application, and for a rehearing thereof.

CHIEF JUSTICE ROBERTS, of Texas, has been nominated for governor of that State. — The judges of the Supreme Court of Michigan have decided that, in cases where the court may be equally divided, they will deliver no opinions, but simply affirm the judgment under the statute. The step has been taken in order to prevent, as far as possible, the evil effects which arise from the unnecessary parade of differences of opinion in the court of last resort. Another advantage will be to keep down, to this extent, the number of reports. — The Attorney-General of Illinois has given an opinion that, under the constitution of that State, a notary public has no power to commit a witness for contempt in not obeying a subpoena. — The Association for the Reform and Codification of the Law of Nations, will open the sixth annual conference at Frankfort-on-the-Maine on the 20th inst. The Lord Chief Baron of England, president of the association, is expected to preside. — An English barrister, Mr. C. J. Tarring, has been appointed Professor of English Law, including International Law and Jurisprudence, in the University of Tokio, Japan. He will lecture in English, that having been adopted as the learned language at the University of Tokio.

INDEX

TO THE

CALIFORNIA SUPREME COURT DECISIONS.

ACTS OF LEGISLATURE.

1870, 189; March 24, 1874, 264; March, 1874, 104.

See **LIEU LANDS**; **POWERS OF LEGISLATURE**, 1.

ADMINISTRATION.

1. Where letters testamentary were directed to be issued to *Joseph Frey*, they are unauthorized and void if issued to *Jacob Frey*; and being void, he would not be entitled to commissions as executor. *Estate of Frey*, 131.

See **WILLS**; *Estate of Selby*.

ADMINISTRATOR.

See **FINDINGS**, 4.

ADVERSE TITLE.

1. Under C. C. Pro., Sec. 738, any person, the owner of *any estate or interest* less than a fee, or otherwise, can maintain an action for determination of an adverse claim. *Pierce vs. Felter*, 185.

ADVERSE USE.

1. The use must be open, and as of right, and also peaceable; the slightest act that operates as an interruption by the owners prevents the acquisition of a right by such use. *Cave vs. Crafts*, 482.

AGREEMENT.

See **CONTRACTS**.

AMENDMENT.

See **STATUTE OF LIMITATIONS**; **FINDINGS**, 6.

APPEAL.

1. An order vacating judgment of dismissal is appealable. *James vs. Center*, 164.

See **FINDINGS**, 6, 7; **PLEADING AND PRACTICE**, 6; **UNDERTAKING ON APPEAL**, 1.

APPRAISERS.

1. Political Code, Sec. 2390, does not impose any *duty* upon either party as to appraisement. No intelligible mode is provided by the statute for the selection of appraisers. *Flanders vs. Locke*, 172.

ARTICLES OF INCORPORATION.

See **CORPORATIONS**.

ASSIGNMENT.

See WAREHOUSE RECEIPTS.

ATTACHMENT.

See SHERIFF, 1; COPARTNERSHIP, 1; *Monroe vs. McDonald*.

ATTORNEYS.

1. A client employed an attorney to bring suit. The attorney compromised the debt before suit at fifty cents on the dollar, and failed to account to his client. *Held*: the settlement was no defense to an action for the full amount claimed. *Ambrose vs. McDonald*, 204.
2. An order *associating* a new attorney is unknown to the practice as prescribed by the Code of Civil Procedure. That Code provides only for the *substitution* of one attorney for another, either upon the consent of the superseded attorney, or upon the application of the client, after notice to the attorney of record. Even if an order associating a new attorney is to be regarded as operating a substitution it is ineffectual if written notice is not given to the adverse party. Nor can such attorney act as sole attorney of record under such an order. *Prescott vs. Salthouse*, 489.

BOND.

See SURETIES.

CERTIFICATE.

See UNDERTAKING ON APPEAL, 1.

CLAIM AND DELIVERY.

1. Where plaintiff claimed drifted lumber and defendant disclaimed any charge for damages. *Held*: error to nonsuit the plaintiff for failure to tender payment of damage.
2. In action of claim and delivery it is sufficient for plaintiff to prove ownership, possession of defendant, demand, and refusal. *Flanders vs. Locke*, 171, 172.

CODE.

2991 C. C. P., 83; 486 C. C., 96; 1493 C. C. P., 222; 1754 C. C. P., 237; 1323 Penal Code, 153; 752 C. C. P., 174; 1880 C. C. P., 182; 738 C. C. P., 185; 581 C. C. P., 164; 2390 Political Code, 172; 953 C. C. P., 106; 3333 C. C., 273; 1970 C. C., 236; 1119 Penal Code, 254; 1161 C. C. P., 162; 1496 C. C. P., 221; 4047 P. C., 241; 1469 C. C. P., 281.

COLLATERAL MATTER.

See CRIMINAL LAW.

COMMON PROPERTY.

See WILLS, 1.

COMPROMISE.

See ATTORNEYS, 1.

CONSTRUCTION.

See DEEDS, 1; WORDS, 1.

CONSIDERATION.

See WAREHOUSE RECEIPTS, 3.

CONTRACTS.

1. Where an express contract has not been fully performed, and an action upon an implied contract to pay the reasonable value of what has been done is maintainable, the express contract may ordinarily be introduced as evidence of value.
2. Where the plaintiffs sue for being prevented from performing a contract, the action is *on the contract*; and unless prevention is proved and found, plaintiffs are not entitled to recover anything on such contract.
3. Mere failure or refusal to pay an installment, as it becomes due, does not amount to prevention; and, therefore, does not authorize the party to abandon the work and recover the benefit he would have received had he fully performed. The fact that defendant failed to make such payments, "well knowing that plaintiffs had to rely on the money received from him," does not change the result.
4. But if the defendant knew at the time the contract was entered into, that plaintiffs relied entirely on his payments to them, or that such reliance was an inducement to the contract on their part, it might be otherwise.
5. So, if defendant had notified plaintiffs that he would pay none of the installments as they should become due, it might amount to prevention. *Cox vs. McLaughlin*, 126.
6. Where a party subscribed a "prospectus" of a railroad company for shares of capital stock, contemplating an organization only after securing subscriptions for one hundred and fifty thousand dollars, a subsequent organization effected without his consent, when subscriptions for only one hundred and thirty thousand dollars had been obtained, operates to release him from further liability. *Santa Cruz R. R. Co. vs. Schwartz*, 283.
7. It is a universal rule in equity never to enforce either a penalty or a forfeiture, so where there existed a contract between parties for the sale of land, containing a forfeiture or penalty for failure to pay the balance of the purchase money, in the view of a court of equity the legal title is retained by the vendor as security for the balance. He may bring ejectment, if out of possession, but if he come into *equity* for relief, his better remedy is to proceed to foreclose the vendor's right to purchase, and the court must fix a day within which he must pay the balance. He can not proceed to enforce the forfeiture or penalty. *Keller vs. Lewis*, 407.

See CROPPING ON SHARES, 1; FACTORS, 1.

CONTRIBUTORY NEGLIGENCE.

1. The 486th Section of the Civil Code, providing that a railroad corporation shall be liable for all damages sustained by any person, and caused by the locomotive of the corporation, when a bell is not sounded or a whistle blown, as directed by that section, does not abrogate the doctrine of contributory negligence, or operate to give a right of action, if an adult; or an infant, by the negligence of the parent, materially and proximately contributed to the injury.
2. The plaintiff, an infant of six years, was permitted by his parents to make use of the roadway of the defendants as a play-ground, and to lie down on the track unattended. *Held*: that such conduct amounted to negligence *per se*, which would defeat a recovery by plaintiff, there being no evidence showing lack of due diligence or care on the part of the railroad company. *Weeks vs. S. P. R. R. Co.*, 96.

COPARTNERSHIP.

1. The seizure by attachment of the partnership property, and the application of the

property to the payment of creditors of the firm, and the fact that the firm did not do business after the attachment was levied, do not of themselves necessarily and conclusively operate as a dissolution of the partnership. The commencement of an action by the firm, subsequent to the attachment, to recover a debt due the firm, and the action not yet having been determined, tends to rebut any inference of the dissolution arising from the above facts. *Barber vs. Barnes*, 124.

See MINING PARTNERS, 1.

CORPORATIONS.

1. A municipal corporation is the creature of the statute invested with such power and capacity only as is conferred by the statute or passed by necessary implication.
2. In construing the words of the grant the whole chapter and the general legislation of the State respecting the matter must be consulted in order to determine whether by the terms "license and regulate" it was intended to authorize licenses for purposes of revenue. Acting on this rule of interpretation it is held that the act giving power "to license and regulate trades, callings, and employment as the public good may require to be licensed and regulated" confers power to exact license fees for purposes of revenue.
3. But an ordinance passed under a general authority of this nature must be—1. Reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State. 2. It must not be oppressive. 3. It must be impartial, fair and general. 4. It may regulate but must not restrain trade or contravene public policy. *Ex parte Frank on habeas corpus*, 27.
4. The instrument from which the corporation derives its being must be held to limit the power of the corporation so that it can bind as stockholders, as of the date of its filing, only those named in the articles, and to the amounts therein mentioned.
5. The defendant signed a preliminary agreement for \$25,000 (250 shares) of the capital stock of the railroad (plaintiff), but signed the articles of incorporation for (40 shares) \$4,000 only. *Held*: in an action to recover \$25,000, and that the defendant be adjudged a subscriber for 250 shares of said stock, and subject to all liabilities in consequence of said subscription, that the action could not be maintained. *Monterey and S. V. R. R. Co. vs. Hildreth*, 404.

COUNTER CLAIM.

See FINDINGS, 5; DEFENSE.

CRIMINAL LAW.

1. Witness stated upon cross-examination that he had lived in Marin County ~~two~~ years, such residence not having been brought out upon direct examination. *Held*: evidence to contradict the witness in rebuttal, that he had testified on a former trial to a residence of *four* years in Marin County, was inadmissible. *People vs. McKeller*, 150.
2. Opinion of witness' veracity based upon personal knowledge, as distinguished from general reputation, is incompetent. *People vs. Methrim*, 151.
3. When the facts from which negligence is sought to be inferred are within the experience of all men of common education, the opinion of experts is inadmissible. It is for the jury to draw the inference of negligence. *Shafter vs. Evans*, 205.

4. The court erred in permitting the District Attorney (against the objection of defendant's counsel) to argue that the failure of defendant to become a witness was to be considered by the jury as a circumstance tending to prove her guilt, and in approving of such action of the prosecuting officer. *Penal Code, Sec. 1323. People vs. Tyler*, 36 Cal. 522. *People vs. Brown*, 153.
5. Under an indictment for robbery the defendant may be convicted for larceny.
6. The jury may be instructed to find the defendant guilty of larceny, if they entertain a reasonable doubt as to whether the offense be robbery or larceny.
7. An indictment for robbery must aver every fact necessary to constitute larceny, with the addition of facts showing force or fear. *People vs. Jones*, 248.
8. The employment of arts and devices, without violence, by which the moral power of a female is so corrupted that she will offer no resistance, is not sufficient to constitute rape.
9. The testimony of medical experts, in a trial for rape, as to the effect of indecent liberties upon the mind of the female, is inadmissible; all such practices are to be classed under the head of *solicitation*, and distinguish the crime of seduction from that of rape. *People vs. Royal*, 250.
10. No person, whether by order of the court or otherwise, can be permitted to show to a criminal jury, when viewing the premises in question, what positions the defendant and witnesses occupied during the commission of an offense. *People vs. Green*, 254.
11. If a question is put to a witness which is collateral or irrelevant to the issue, his answers can not be contradicted by the party who asked the question, but is conclusive against him. *People vs. Bell*, 430.
12. It is error to refuse instructions to jury as to reasonable doubt upon any fact essential to constitute the offense charged. *People vs. Morino*, 152.

See *People vs. Herrera*.

CROPPING ON SHARES.

1. A lease contained a clause providing that possession of crops should remain with lessors until certain payments were made. While the payments were in default the lessee sold and delivered a portion of the crop. *Held*: the vendee acquired no title against the right of the lessors; the possession of lessee was as servants of the landlords, and in replevin the latter must prevail. *Wentworth & Osborn vs. Miller & Lux*, 193.

CROSS-COMPLAINT.

See *DISMISSAL*, 1.

DAMAGES.

1. In an action for damages for the wrongful seizure and detention of property, the measure of damage is what the use of such property could have been procured for—in other words the market value—and not what the use of such property was worth to the plaintiff, considering how the plaintiff could and would have used it had it not been taken from him. *Hurd vs. Barnhardt*, 246.
2. In actions for negligence the damages to be recovered are only those of which the negligent act is the *proximate cause*. *Civil Code, Sec. 3333. Chidester vs. Consolidated People's Ditch Co.*, 273.

See *CONTRIBUTORY NEGLIGENCE*, 1; *RIPARIAN OWNERS*, 1; *MASTER AND SERVANT*, 1; *VERDICT*, 1.

DEEDS.

1. Where two or more different descriptions occur in a deed, it must be construed most strongly against the grantor. *Hagar vs. Spect*, 86.
2. Where a recital in a deed shows that the sale was in January, 1855, under an execution for a deficiency, seven months before the sale of the mortgaged premises under the decree of foreclosure, in June, 1855, it is apparent that 1855 was inserted by mistake for 1856. *Frost vs. Meetz*, 256.
3. When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants in the form which it assumes at the time he transfers it. The incident goes with the principal thing. The idea and definition to an easement to real estate granted is a privilege off and beyond the local boundaries of the lands or tenement conveyed. The word "appurtenances" is not necessary to the conveyance of an easement. *Cave vs. Crafts*, 482.

See SHERIFF'S DEED.

DEFAULT.

1. Where defendant erroneously believed he was served on the 26th of April, but in fact was served on the 25th and was one day too late with his answer. *Held*: upon an affidavit of merits and the answer filed showing a legal defense, the default should be set aside. This case distinguished from *People vs. Rains*, 23 Cal. 129. *Reidy vs. Scott*, 165.

See FORFEITURE, 1.

DEFENSE.

1. In defense, a counter claim was interposed for pasturing plaintiff's cattle. *Held*: error to require defendant to prove a special agreement for pasture on land not included in a lease from defendant to plaintiff. *Hurd vs. Barnhardt*, 246.

See ATTORNEYS, 1; FINDINGS, 2; PLEADINGS AND PRACTICE, 13.

DEFICIENCY.

See FORECLOSURE, 3, 5.

DELINQUENT TAX.

See POWERS OF LEGISLATURE.

DISMISSAL.

1. Judgment of dismissal may be entered by the clerk, notwithstanding cross-complaint filed by defendant. C. C. P. § 581 construed. *James vs. Center*, 164.

See APPEAL.

DISSOLUTION.

See COPARTNERSHIP.

DIVORCE.

1. Example of evidence held insufficient to support a decree of divorce on the grounds of desertion, cruelty, and neglect to provide. *Christie vs. Christie*, 207.

DOCKETING.

See FORECLOSURE, 3.

ESTATE.

See ADVERSE TITLE.

ESTOPPEL.

1. Where a party represents that he has power, and does execute a power of attorney to convey lands for another party, he and all parties claiming under him is estopped, when the title has come to his own hands, to deny that he had been duly authorized to execute the power of attorney. *Hagar vs. Spect*, 86.

ESTRAY CATTLE.

1. Cattle passing over and along a public road in charge of a herder, and not being upon the road for the purpose of being pastured there, and in passing did casually eat of the grass growing at the roadside, are not estrays, and subject to proceedings under the Statute of March, 1874.
2. The court below found that the plaintiff's cattle had been driven to Wolf Creek for the purpose of being watered, and while there in charge of a herder, who had fallen asleep for the moment, were found pasturing upon both sides of the road. *Held*: that in the absence of an intent to so pasture them, the cattle would not be subject to proceedings under the Act. *Thompson vs. Corpstein*, 104.

EQUITY.

See CONTRACTS.

EVIDENCE.

See CONTRACTS, CRIMINAL LAW, CLAIM AND DELIVERY, DIVORCE, PLEADINGS AND PRACTICE, OFFICERS DE JURE, WAREHOUSE RECEIPTS, MARRIAGE.

EXPERTS.

See CRIMINAL LAW.

FACTORS.

1. Contracts made by third parties, with a factor in respect to the property, without knowledge on the part of said third party that said factor is not the real owner, will be binding upon the owner.
2. A factor has ostensible authority to deal with the property as his own in transactions with persons not having notice of the real ownership. *Green vs. Campbell*, 43.

See *Green vs. Meyer*.

FINDINGS.

1. That certain persons were "acting as trustees" of a school district, and that "there was no sufficient evidence of the election" of such persons, is merely a recital of evidence, and not a sufficient finding. *Delphi School District vs. Murray*, 145.
2. Omission to find upon an affirmative defense set up in the answer is error. *Phipps vs. Harlan*, 191.
3. The findings in an action for the recovery of personal property, should contain a description thereof. A finding referring to the complaint for description, when it appears that the amended complaint was intended, is irregular. *Kelley vs. McKibben*, 202.
4. In an action against an administrator upon a disallowed claim, the presentation of which was made after the ten months had elapsed, it is necessary that the pre-

cise time when the claim became due appear in the findings. C. C. Pro., Sec. 1493. *Elliott vs. Peck*, 222.

5. Omission to find upon a counter claim is error.
6. Amending the findings after an appeal taken, for that reason, if for no other, is error. *Baggs vs. Smith*, 223.
7. Where appeal is taken by bill of exceptions or statement, the fact of non-waiver of findings must affirmatively appear in order to avail appellant of the error. *Smith vs. Lawrence*, 225.
8. A finding, "that all the issues of fact raised by the pleadings are hereby found and decided in favor of the plaintiffs and against the defendant," is indefinite and insufficient. The court below should determine in the findings what are the issues raised in the pleadings. *Johnson vs. Squires*, 235.

See PARTITION, 2; JUDGMENT, 1.

FORECLOSURE.

1. Persons claiming title adversely to the mortgagor are not proper parties to a foreclosure suit, as they have no interest in the subject matter of the action.
2. All persons beneficially interested, either in the estate mortgaged or the demand secured, are proper parties. *Croghan vs. Minor & Spence*, 148.
3. Where a mortgagor claimed a homestead, after which the creditor foreclosed, and deficiency was docketed. *Held*: no lien attached by virtue of the docketed judgment. The judgment creditor (for deficiency) was not entitled to redeem. The mortgagor or his grantee could redeem from the purchaser on payment of the sum bid and costs. *Hershey vs. Dennis*, 188.
4. Johnson executed a note to the Bank of San Luis Obispo, dated February 2, 1875, payable two years after date, with interest at one per cent. per month, payable monthly, and if not so paid to be compounded; and as security for the payment of said note, executed a mortgage containing this clause: "In case of default by the mortgagor in the payment of said note or interest, or in the performance of any of the conditions hereof, then the mortgagee may, at its option, either commence proceedings to foreclose this mortgage in the usual manner, or cause the said premises or any part thereof to be sold," etc. *Held*: that the mere failure to pay the interest as it becomes due does not make the principal sum due, and entitle the mortgagee to proceed to foreclosure for the note and interest. The foreclosure proceedings must be limited to the collection of so much interest as may be due. *Bank of San Luis Obispo vs. Johnson*, 243.
5. Section 246 of the Practice Act of 1851 did not require any formal report of sale under a foreclose of mortgage, showing in term the amount of deficiency, nor does the amendment of 1860 require anything more than the return of the sheriff of the amount for which the premises had sold to give the judgment creditor the benefit of a lien on the general real estate of the debtor. It is only necessary that it appear from the sheriff's return that there is a deficiency of such proceeds and a balance still due, and the judgment shall then be docketed. To ascertain the exact balance is a mere matter of computation and may be made either by the sheriff or clerk. *Frost vs. Meetz*, 256.

FORFEITURE.

1. A stipulation for re-entry by vendor in an agreement to convey, if default be made in any of the installments for the space of ninety days, constitutes an agreement that time should not be considered of the essence of the contract during the ninety days, and postpones any action founded upon vendee's default, until the expiration of that period. *Weill vs. Jones*, 147.

See CONTRACTS.

GOLD COIN.

See JUDGMENT, 2,

GUARDIAN AND WARD.

1. A settlement *in pais* will not support an action for balance due from guardian, unless such settlement has been approved by the Probate Court. *Allan vs. Tiffany*, 237.

See JURISDICTION.

HOMESTEAD.

1. Actual residence at the time of filing the declaration necessary to constitute a homestead. *Dorn vs. Howe*, 98.

See FORECLOSURE, 2; *Gottschalk vs. Keester*.

HUSBAND AND WIFE.

See PLEADINGS AND PRACTICE.

INDICTMENT.

See CRIMINAL LAW.

INSTALLMENTS.

See CONTRACTS.

INSTRUCTIONS.

1. An erroneous instruction is not cured by a proper one if both go to the jury; they are contradictory, and it is impossible to determine on which of them the jury acted. (*People vs. Campbell*, 30 Cal. 312; *Brown vs. McAllister*, 38 Cal. 573; *People vs. Anderson*, 44 Cal. 65.) *Chidester vs. Cons. People Ditch Co.*, 273.

See CRIMINAL LAW.

INTEREST.

See FORECLOSURE.

INTERLOCUTORY DECREE.

See PARTITION.

INTERVENTION.

See SHERIFF.

JUDGMENT.

1. A judgment is invalid for uncertainty where it refers to the findings for certain *data*, and the findings in turn refer to the pleadings, from which it can not be intelligibly ascertained what is meant. *Kelly vs. McKibben*, 202.
2. In an action upon a tort, a judgment in gold coin is irregular, and the judgment will be modified upon appeal. *Livingstone vs. Morgan*, 209.

See DISMISSAL, 1; SHERIFF, 1; ESTATE OF KEHOE.

JURISDICTION.

1. An action for trespass on real property, in removing fences, is within the jurisdiction of a Justice of the Peace, where the gravamen of the action is plaintiff's possession of the land, and the damages sued for are less than three hundred

dollars. *Pollock vs. Cummings* (38 Cal. 683) cited. *Livingstone vs. Morgan*, 209.

2. An action will not lie in the District Court to recover for default of a guardian, until after an accounting and settlement in the Probate Court. The latter has exclusive jurisdiction to determine the state of accounts between the guardian and ward. C. C. Pro., Sec. 1754, construed. *Allan vs. Tiffany*, 237.
3. The Probate Court has no jurisdiction to receive or in any way to act upon an account of a deceased executor with the estate of which he was executor when presented by the executor of the deceased executor. *Wetzlar vs. Fitch*, 311.

JURY.

See CRIMINAL LAW.

JUSTICES' COURTS.

See JURISDICTION.

LARCENY.

See CRIMINAL LAW.

LEASE.

See CROPPING ON SHARES.

LIEU LANDS.

1. At the time defendant filed his application in 1876 the act under which he proceeded had been repealed. Plaintiff in 1875 filed upon the same land. In 1870 the Legislature passed an act to save the rights of purchasers under the repealed law. *Held*: that defendant's application, however defective, was made valid by the curative statute of March 24, 1870, and he is entitled to purchase the land from the State. *Wanzer vs. Somers*, 167.

LIEN.

See FORECLOSURE.

LIMITATION.

See FINDINGS.

LUMBER DRIFTS.

See APPRAISERS.

MARRIAGE.

1. The doctrine recognized that marriage may be sufficiently established by evidence of a contract *per verba in praesenti* and *per verba de futuro cum copula*. *Estate of McCausland, deceased*, 182.

MARRIED WOMEN.

See POWER OF ATTORNEY.

MASTER AND SERVANT.

1. The common employer is not bound to respond in damages by reason of an employé's negligence, in the absence of evidence that he had neglected to use ordinary care in the selection of the employé. *McDonald vs. Haseltine*, 236.

MISTAKE.

See DEEDS.

MISNOMER.

See ADMINISTRATOR.

MINING PARTNERS.

1. John Nisbet, the plaintiff's grantor, and the defendant Nash, sold an undivided one-half of certain mining grounds to the defendants, Fletcher and Sexey. All began working and contributing to the development of said claim; but finding that it was unproductive, suspended work. The plaintiff again, and without the consent of the defendants, began work, and expended further money on said property. The court below held that the plaintiff and defendants were not mining partners. *Held: error. Nisbet vs. Nash, 102.*

MORTGAGE.

See FORECLOSURE.

NEGLIGENCE.

See DAMAGES; CONTRIBUTORY NEGLIGENCE.

NOTICE.

See STREET ASSESSMENT; ATTORNEYS.

OFFICERS DE JURE.

1. The undisturbed exercise of public offices raise a presumption that the persons so acting are officers *de jure*. If the presumption is not overcome by opposing proof, the court should find that these persons are *de jure* officers. *Delphi School District vs. Murray, 115.*
2. An allegation that plaintiffs "are the duly elected, qualified and acting trustees," in and for the Delphi School District, is sufficiently proven by evidence that they were *acting* as trustees, there being no opposing evidence. *Ib.*

OUSTER.

See TENANCY IN COMMON.

PAROL AGREEMENT.

See STATUTE OF FRAUDS.

PARTITION.

1. In an action under C. C. Pro., Sec. 752, for sale of property held in common, it is indispensable that the rights and interests of the respective parties be definitely ascertained in the interlocutory decree.
2. An interlocutory decree directing a sale, proceeds of which to await determination of rights in final decree, is error, for which a new trial will be awarded.
3. The findings and conclusions of the court, upon which is based the interlocutory decree, can not cure the defects of the latter. *Lorenz vs. Jacobs, 174.*

PARTIES.

See FORECLOSURE; PLEADINGS AND PRACTICE.

PERFORMANCE.

See CONTRACTS.

PLEDGE.

See WAREHOUSE RECEIPTS.

PLEADING AND PRACTICE.

1. Where the answer of a defendant contains several denials, and also an averment of new matter as a defense, it is erroneous to deprive the defendant of the benefit of the denials contained in their answer. The defendant has a right to set up negative as well as affirmative defenses to an action, and the affirmative matter, separately pleaded, does not operate as a waiver or withdrawal of the denials contained in other portions of the answer. *Billings vs. Drew*, 107.
2. The circumstance that an application to obtain title had been filed in the United States Land Office does not tend, even in the most remote degree, to show exercise of control over the premises, and to admit such evidence for such a purpose is error. *Pulliam vs. Cherokee Flat Blue Gravel Co.*, 108.
3. A demurrer to a special defense was sustained, whereupon defendant offered to prove the matters set up in the special defense, under the general denial, which the court refused to allow. *Held*: respondent can not on appeal maintain that the sustaining of the demurrer worked no injury, because such defense might have been made under the general issue. *Green vs. Campbell*, 153.
4. Complaint against the husband alleging sale and delivery of goods to the wife is defective. The averment should charge sale and delivery to the defendant. *Simon Jacobs & Co. vs. Scott*, 168.
5. Where the answer discloses the fact that third persons have succeeded to defendant's interests, in whole or in part. *Held*: these persons must be made parties defendant as being necessary to a complete determination. *Robinson vs. Gleason*, 190.
6. Appellant having offered no evidence in his defense at the trial, took an appeal from the order denying a nonsuit, and an appeal, also, from the judgment. The plaintiff's evidence was held, on appeal, insufficient to support the judgment. *Held*: "The appeal from the order overruling the motion for a nonsuit is dismissed, the judgment is reversed, and the cause remanded." *Christie vs. Christie*, 207.
7. Where the court below tried the cause upon the assumption that all the material allegations were denied, the insufficiency of a denial will not be heard in the Supreme Court. *Cave vs. Crafts*, 482.
8. Even if the same subject matter were involved in a former action, the judgment in that action must be pleaded as a former determination. *Cave vs. Crafts*, 482.

See FORECLOSURE, 1; TENANCY IN COMMON, 1; TRESPASS, 1; ADVERSE TITLE, 1; CONTRACTS, 1; SPECIFIC PERFORMANCE; *Waugh vs. Wingfield*.

POWERS OF LEGISLATURE.

1. Section 11, Article I, and Section 13, Article XI, are not violated by the Act of March 28, 1874. The Legislature may levy a tax either before or after the value of property is ascertained; and the provision in the Act that the amounts that had been previously paid in pursuance of an invalid levy should be credited as a payment *pro tanto* is not an exemption of such property from taxation. *The People vs. Latham*, 93.

POWER OF ATTORNEY.

1. A power of attorney executed by a married woman in 1864, without her husband uniting in its execution, is void. *Heinlen vs. Martin*, 305.

See ESTOPPEL, 1.

PREVENTION.

See CONTRACTS.

PROBATE COURT.

See JURISDICTION; WITNESSES.

RAPE.

See CRIMINAL LAW.

REDEMPTION.

See SHERIFF'S DEED; FORECLOSURE.

REASONABLE DOUBT.

See CRIMINAL LAW.

RESIDENCE.

See HOMESTEAD.

RESPONDEAT SUPERIOR.

See MASTER AND SERVANT.

RIPARIAN OWNERS.

1. Where a party diverts water flowing in a natural channel, and devotes a portion to his own use, without averring that he is a riparian owner, it is proper to instruct the jury to find against him for nominal damages, even though no actual damage had been suffered. Without such an averment, and no other right appearing from the record, he would not be entitled to divert the water for any purpose; and an instruction to the effect that he was entitled to water for domestic use, in such quantity as not to damage riparian owner, is erroneous. *Creighton vs. Evans*, 271.
2. When waters have been appropriated for agricultural purposes from a natural stream through artificial conduits over the public lands, prior to a purchase from the Government of public lands, such rights, initiated and maintained by appropriation, were confirmed by the Act of Congress granting the right of way to ditch and canal owners over the public lands. *Cave vs. Crafts*, 482.

ROBBERY.

See CRIMINAL LAW.

SEALED PROPOSALS.

See STREET ASSESSMENTS.

SEDUCTION.

See CRIMINAL LAW.

SETTLEMENTS.

See GUARDIAN AND WARD SURETIES.

SHERIFF'S DEED.

1. Where a redemptioner makes a proper tender, the Sheriff has no power to execute a deed to purchaser. *Hershey vs. Dennis*, 188.

SHERIFF.

1. Where a Sheriff, by virtue of an attachment, takes possession of property, and a suit in replevin is begun, and he afterward turns over said property to a third party, to be held by said party until a final judgment, in pursuance of a stipulation to that effect signed by all the parties to both actions, a judgment in *form* might be recovered against the Sheriff in the replevin suit; but there

should be added a direction that the enforcement of the judgment against the property of the Sheriff be perpetually stayed.

2. Nor is the responsibility of the Sheriff changed by the appearance of new parties (who are the real owners) after the signing of said stipulation, when it appears from the original complaint that the suit was brought for their benefit, and by one claiming to be their representative.

This appearance is by way of *substitution*, and not *intervention*. *Temple vs. Alexander*, 267.

SIXTEENTH AND THIRTY-SIXTH SECTIONS.

1. Applications to purchase sixteenth and thirty-sixth sections may be filed immediately after the actual survey—the survey in the field—approved by the Surveyor-General.
2. As a question of priority, the first applicant *after an approved survey in the field* is entitled to the certificate of purchase when the land is accepted and the Register notifies the State office thereof. *Oakley vs. Stuart*, 228.

SPECIFICATIONS.

See STREET ASSESSMENTS.

SPECIFIC PERFORMANCE.

1. When by the terms of a lease the lessee may elect to purchase at any time during the term, upon the payment of a certain sum, and does give notice to the lessor that he has so elected, the lessor waives the necessity of a tender before suit is brought when he ignores the right of the lessee to purchase.
2. It is sufficient when the plaintiff avers that he is ready and willing, and offers to comply with all the terms and conditions of the agreement, and to pay any sums that may be due the defendant under the contract. *Dowd vs. Clark*, 92.

STATE LANDS.

See LIEU LANDS; SIXTEENTH AND THIRTY-SIXTH SECTIONS; *Silver vs. Mullen*.

STATUTE OF LIMITATIONS.

1. In an action of trespass, an amended complaint was filed for the purpose of including a portion of a tract inadvertently omitted from the description contained in the original complaint. *Held*: the Statute of Limitations continued to run, as to the omitted land, during the interval of time between the original and the amended complaints. *Atkinson vs. Amador and Sac. Canal Co.*, 226.

See FINDINGS, 4.

STATUTE OF FRAUDS.

1. When a party, by parol, agrees to purchase certain real estate, and then, by parol, gives the benefit of the purchase to a third party for a consideration, the transaction is not within the Statute of Frauds; and if the owner of the lands makes the deed to the said third party, and a benefit and advantage is thereby gained by said third party, an action will lie against the said third party on his contract to pay for the benefit of purchase. *McCarthy vs. Pope*, 90.

STOCKHOLDERS.

See CORPORATIONS, 4, 5.

STREET ASSESSMENT.

1. Where contract was made before and assessment after, the Act of 1870, p. 890—*Held*: the contractor could maintain the action. *Dyer vs. Pixley*, 44 Cal. 158. affirmed. *Dyer vs. Barstow*, 187.

2. All proceedings under a notice inviting sealed proposals which did not refer to a *diagram and specifications* of the proposed work as required by the 27th Section of the Act of March 27, 1872, to re-incorporate the city of Stockton, are invalid, and property is not liable to an assessment under them. *City of Stockton vs. Clark*, 264.
3. Where a survey, diagram, and specifications have been made by the City Surveyor of work on a certain street, though made without order or authority of the City Council, and filed with the Clerk, a subsequent resolution authorizing and directing the Clerk to re-advertise for sealed proposals for work on the said street to be completed in accordance with the "plans and specifications therefor now on file in the office of the City Clerk," is equivalent in law to an adoption of said survey, diagrams, and specifications, and is tantamount to a prior direction to the City Surveyor to make said survey, diagram, and specifications. *City of Stockton vs. Skinner*, 265.

See *Dyer vs. Scalmanini*.

SUBSCRIPTIONS.

See CONTRACTS; CORPORATIONS.

SUBSTITUTION.

See SHERIFF.

SURVEY.

See STREET ASSESSMENTS; SIXTEENTH AND THIRTY-SIXTH SECTIONS.

SURETIES.

1. The sureties upon a guardian's bond are not liable until the accounts have been passed upon, and a settlement had, in the Probate Court. *Allan vs. Tiffany*, 237.

TENANCY IN COMMON.

1. The plaintiff brought this suit to quiet title, and derived title from Meyer & Bennitz; and defendant from Hendy & Glein. Prior to the deeds to plaintiff and defendant the title to the land in controversy had been confirmed and patented to Meyer, Bennitz, Hendy, Glein and Duncan. Plaintiff also claimed, through one Rufus, who had a Mexican grant, and alleged in his complaint that he was the owner in fee simple, absolute, and had been in actual possession for more than fifteen years. *Held*: that he was only a tenant in common with the defendant, and that if any equities existed in his favor growing out of the deed of Rufus, they must be determined in some action with appropriate pleadings and all necessary parties. (Duncan was not a party to this action.) *Bihler vs. Platt*, 65.
2. The relation of tenants in common having been established, a finding that the defendants took possession of the land, "and have ever since retained possession of the same, and excluded the plaintiff from the same and every part thereof," is an express finding of an ouster; and not being attacked on motion for new trial, is conclusive, and renders the defendants liable for rents and profits or use and occupation. *Heinlen vs. Martin*, 305.

TENDER.

See SPECIFIC PERFORMANCE; CLAIM AND DELIVERY.

TRESPASS.

1. When the defendant is in adverse possession of lands, claiming the right of possession, and was still in possession at the time the action was brought, the plaintiff can not maintain an action of trespass, or a bill to prevent the commission of supposed acts of trespass on said premises. *Snow vs. Kimmer*, 94.

2. An averment of an easement will support an action for trespass. *Cave vs. Crafts*, 482.

See VERDICT.

UNDERTAKING ON APPEAL.

1. A certificate that a good and sufficient undertaking on appeal in due form of law has been executed and is now on file in said action, does not conform to Section 953 of the Code of Civil Procedure. *Watson vs. Cornell*, 106.

VENUE.

See *Wilson vs. S. P. R. R. Co.*

VERDICT.

1. Where in an action for trespass the damages proven are nominal, but the verdict is equal to the entire value of the property, the verdict will be set aside. *S. L. G. R. Co. vs. S. and C. R. R. Co.*, 170.

VIEW OF PREMISES.

See CRIMINAL LAW.

WATER.

See RIPARIAN OWNERS.

WAIVER.

See FINDINGS.

WAREHOUSE RECEIPTS.

1. The assignment of a warehouse receipt will transfer the title to the goods, and it must necessarily follow that the possession of the receipt indorsed in blank is presumptive evidence of the ownership of the goods by the holder of the receipt.
2. By Section 2991, Civil Code, one who has allowed another to assume apparent ownership of property for the purpose of making any transfer of it, can not set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith in the ordinary course of business and for value.
3. A pre-existing debt is a valuable consideration within the meaning of that Section. *Davis vs. Russell*, 83.

See *Farmers' Storage Co. vs. DeLappe*.

WILLS.

1. A testator has power to dispose of only one-half of the common property; the other survives to the wife, and she by receiving letters testamentary, and claiming under the will, did not renounce her rights to one-half of the common property. *Estate of Frey*, 131.

WITNESSES.

1. The third subdivision of Section 1880 of the Code of Civil Procedure provides that "parties to an action of proceeding * * * against an executor or an administrator, upon a claim or demand against the estate of the deceased," can not be witnesses. *Held*: an application for a family allowance is not within the statute, and the claimant is competent to testify. *Estate of McCausland, deceased*, 182.

See CRIMINAL LAW, 2, 4.

WORDS.

1. The usual and proper sense of words will not apply in contracts where it is apparent that another sense was intended: *e. g.* to rescind construed in sense of to cancel. *Weill vs. Jones*, 147.

GENERAL INDEX.

ABSTRACTS OF DECISIONS:	PAGE.	BANKRUPTCY:	PAGE.
Carriers.....	19, 74, 460	Composition.....	77, 99, 457
NATIONAL BANKS—Indebtedness for more than one-tenth of the capital stock	19	Contracts	77, 458
Set off after Judgment.....	39	Discharge.....	78
Indian Country.....	39	Injunction.....	78
Appeal by Party not Inferred by De- cree.....	39	Husband and Wife.....	79
Sale—Record at Custom House.....	44	Partnership	80
Charters	74	Redemption	80
Duress.....	75	Fraud.....	98
Fire Insurance.....	76	Jurisdiction	99
Municipal Bonds.....	137	Merchant	99
Taxation	188, 158	Set-off.....	100
Domicile.....	158	Probable Debts.....	100
Bills and Notes	159	Exemption.....	100
Eviction.....	160	Lease.....	458
Stockholders.....	162	National Banks.....	459
Surety	176		
Assignee of Corporate Stock.....	242	BOOK NOTICES:	
Exemption.....	263	Bump's Notes of Constitutional De- cisions.....	817
Alteration of Note.....	263	Whorton's Legal Maxims.....	818
Evidence.....	278	Field on Corporations.....	819
Trusts.....	279	Choice Books.....	820
Master and Servant.....	295, 460	Epitome of Fearne.....	840
Commutation.....	296	CASES DECIDED WITHOUT OPINIONS.....	491
Insurance.....	304	CIVIL CODE AMENDMENTS.....	177
Constitutional Law.....	38, 316, 443	CODE OF CIVIL PROCEDURE AMENDMENTS.....	178
Chattel Mortgage.....	316	COMMUNITY PROPERTY—Can a Married Woman Mortgage it.....	423
Limitations	316		
State Lands—Survey.....	321	DECISIONS IN FULL:	
Pre-emption.....	321	FOSAYMAN <i>vs.</i> TWOMBAY—Consular Courts of Japan—What Constitutes a Record therefrom.....	5
Telegraph Co.—Damages.....	322	LITTLE YORK G. AND W. CO. <i>vs.</i> KEYES—Removal of Causes.....	9
Partnership	322	UNITED STATES <i>vs.</i> NAT. BANK OF BOSTON—Money obtained by fraud can be reclaimed from the Govern- ment	15
Landlord and Tenant.....	338	LEROUX <i>vs.</i> REEVES—Void Tax Deeds..	33
Respondeat Superior.....	339	PENNOYER <i>vs.</i> NEFF—Non-residents —Publication of Summons.....	49
Personal Services.....	339	STOREY <i>vs.</i> EARLY—Libel.....	68
Corporation—Church.....	339	EUREKA CON. MINING CO. <i>vs.</i> THE RICHMOND MINING CO.—Jurisdi- ction—Injunction	111
Suicide	366	FICKLIN <i>vs.</i> GARVER — Removal of Causes.....	119
Subscription to Stock.....	378	TRUMAN <i>vs.</i> HYDE—Parol Evidence..	132
State Comity.....	379	WOOLEN <i>vs.</i> BANKER—Constitutional Law.....	135
Covenants—When unusual.....	381	APPLICATION OF AH YUP—Naturaliza- tion—Chinese	195
Payment of Notes at Bank.....	383	DONOHOE <i>vs.</i> MARIPOSA LAND AND MINING CO.—Foreclosure—Remov- al of Causes.....	211
Improper Treatment of Wounds.....	402	NATOMA WATER AND MINING CO. <i>vs.</i> BUGBY—State Lands.....	275
Foreclosure—Parties.....	440	EDWARDS <i>vs.</i> KEARZY — Exemption Laws—When unconstitutional....	284
Misconduct of Officer, in Charge of Jury.....	440		
Negligence—Proximate and Remote Cause	220, 440		
Future Damages.....	443		
Damages in Civil Suit Prosecuted with Malice.....	444		
Sureties in Attachment.....	445		
Confiscation	468		
Corporate Bonds.....	468		
Maritime Law	468		
Eight-hour Law.....	468		
ABSTRACTS OF LAWS OF 1877-8.....	297		
ACT REPEALING THE BANKRUPT ACT.....	341		

DECISIONS IN FULL:	PAGE.	DECISIONS IN FULL:	PAGE.
W. P. P. R. R. Co. <i>vs.</i> WHIPPLE— Contributory negligence	313	MATTER OF CRAIG—Conditions in par- don valid	433
VAN SICE <i>vs.</i> STEAMSHIP COLIMA— Salvage compensation.....	326	THE M. AND H. GLUE Co. <i>vs.</i> UPTON— Patent—Novelty.....	446
U. S. <i>vs.</i> VAN AUKEN—Note for less than one dollar.....	335	FONDA <i>vs.</i> BRITISH-AMERICAN INS. Co. —Foreign corporation.....	449
MEISTER <i>vs.</i> MOORE — Marriage — When Valid.....	347	BERGHEIM <i>vs.</i> GREAT EASTERN R. W. Co.—Liabilities of carriers of pas- sengers.....	451
NEW YORK LIFE INS. CO. <i>vs.</i> EGGLESTON— Forfeiture for non-payment..	353	DUDYMOTT <i>vs.</i> KANSAS PAC. R. R. Co. —Pre-emption of railroad lands...	468
DUFF <i>vs.</i> WILLIAMS—Liability for rep- resentations as to credit of another.	389	IN RE SPENCER — Citizenship — Good moral character.....	494
EGGLESTON <i>vs.</i> BOARDMAN—Value of attorney's services.....	392	HASTINGS' LAW SCHOOL—Course and Method of Instruction.....	464
BEADBURN <i>vs.</i> FOLEY—Custom bad in law.....	395	INDICTMENT for Selling Land Twice..	462
IN RE JACKSON—Inspection of letters.	409	MARRIED WOMEN'S CONTRACTS.374,	382
SEMPLE <i>vs.</i> BANK OF BRITISH COLUM- BIA—Foreign corporations.....	417	OUR JUDICIAL SYSTEM.....	367
JEFFERSON, MAD. AND IND. R. R. Co. <i>vs.</i> ESTERLE—Injury to property by railroad on public street	432	REHEARINGS GRANTED.....	493
		REHEARINGS DENIED.....	494
		TIMBER ACT.....	331
		TERMS OF COURT.....	180











